CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 102

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THOMAS R. POWERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1938
CERTIORARI GRANTED OCTOBER 10, 1938

No. 8419

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

THOMAS R. POWERS, EDWARD SCHROEDER, M. H. TSCHIRGI, BERTHA TSCHIRGI, ANTLER LAND COMPANY, a Montana corporation, B. B. BELKEN, EDITH G. BELKEN, JUDY WALSH, H. G. CAMPBELL, REG. PEARCE, JAY L. HENMAN, RUTH HENMAN, F. L. YATES, EMMA E. YATES, GEORGE S. GIBSON, JOSEPH A. GRAHAM, DOMINIC STEVENS, NICKELS DETHLEFSEN, MARY DETHLEFSEN, C. E. LINTHACUM, BILLIE MILLER and ROBERT J. MILLER,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

Parker Printing Company, 545 Sansome Street, San Francisco 60-2-2-37

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Attorneys, Names and Addresses	1
Answer of M. H. Tschirgi, et al.	43
Answer of F. L. Yates, et al.	102
Answer of Nickels Dethlefsen, et al.	133
Assignment of Errors	569
Bill of Complaint	2
Caption	2
Citation	578
Clerk's Certificate to Transcript	582
Decision of the Court	253
Decree	317
Findings of Fact and Conclusions of Law	307
Motion of Defendants Dethlefsen, et al., to make other persons parties defendant	161
Motion of defendants Dethlefsen for Findings, etc.	229
Motion of Defendants Tschirgi, et al., for Findings, etc.	242
Motion of Plaintiff for Supplemental Findings, etc.	278

Index

Page

Motion of Plaintiff for Supplemental Findings, etc. 304

Order Denying Motion to make other persons parties defendant 221

Order Extending Time for Statement of Evidence 277

Objections of Defendants to Plaintiff's Proposed Findings, etc. 293

Objections of Plaintiff to Findings proposed by Defendants Yates 295

Objections of Plaintiff to Findings proposed by Defendants Dethlefsen 297

Objections of Plaintiff to Findings proposed by Defendants Tschirgi, et al. 300

Order Extending Time for Bill of Exceptions 306

Order Allowing Appeal 577

Proposed Findings, etc., of Plaintiff 221

Proposed Findings, etc., of Defendants Yates 236

Proposed Findings, etc., of Defendants Dethlefsen 279

Proposed Findings, etc., of Defendants Tschirgi, et al. 286

Petition for Appeal 576

Prayer for Reversal 577

Praecipe for Transcript of Record on Appeal 589

Reply to Answer of Defendants Dethlefsen, et al. 167

Index

Page

Reply to Answer of Defendants Tschirgi, et al. 185

Reply to Answer of Defendants Yates 178

Stipulation to Amend Complaint 40

Statement of Evidence 320

Exhibits for Defendant:

Exhibit Eleven—Letter from Jos. M. Dixon to T. H. Burke, dated February 17, 1933 362

Exhibit Thirteen—Bozeman Trail Ditch Contract, dated July 24, 1922 373

Exhibit Sixteen—Letter from Acting Commissioner of Indian Affairs to James G. Hatchitt, dated May 28, 1890 440

Exhibit Seventeen—Letter from Commissioner of Indian Affairs to John K. Rankin, dated June 26, 1901 448

Exhibit Nineteen—Land Grant to Arthur Peters, dated February 18, 1918 460

Exhibit Twenty—Indenture between Arthur Peters and Grace Peters and Mary Dethlefsen, dated April 10, 1922 462

Exhibit Twenty-one—Land Grant to Alice Peters, dated July 26, 1923 464

Index

Page

Exhibits for Defendant (cont.):

Exhibit Twenty-seven—Letter from Commissioner of Indian Affairs to W. M. Johnston, dated February 9, 1935 469

Exhibit Thirty-one—Notice of Appropriation, dated December 29, 1915 489

Exhibit Thirty-three—Location of Water Right—Notice of Appropriation, dated November 8, 1905 492

Exhibit Thirty-five—Letter from Acting Commissioner of Indian Affairs to Samuel G. Reynolds, dated April 6, 1905 497

Exhibit Thirty-eight—Notice of Appropriation of Water, signed by W. W. Scott, dated August 1, 1912 518

Exhibit Forty-six—Letter from Assistant Commissioner of Indian Affairs to Charles E. Roblin, dated March 19, 1921 535

Exhibit Forty-seven—Letter from Assistant Commissioner of Indian Affairs to Charles E. Roblin, dated March 7, 1921 539

Exhibit Forty-eight—Various letters exchanged re Schedule of Allotments 547

Index

Page

Exhibits for Defendant (cont.):

Exhibit Fifty-five—Excerpts from a Letter from Commissioner of Indian Affairs to Kenneth R. L. Simmons, dated March 9, 1935 565

Exhibits for Plaintiff:

Exhibit Three—Excerpts from a Letter from H. J. Armstrong to the Commissioner of Affairs, dated November 22, 1884 327

Exhibit Four—Excerpts from an Authority to Advertise for Bids 333

Exhibit Five—Excerpts from a Report of Henry J. Armstrong dated September 20, 1885 334

Exhibit Six—Excerpts from a Letter from W. A. Jones to Walter H. Graves, dated April 19, 1898 337

Exhibit Seven—Excerpts from a Letter from the Secretary of the Department of Interior to the Commission of Affairs 338

Exhibit Eight—Letter from the Secretary of the Department of Interior to the Commissioner of Indian Affairs, dated May 5, 1891 340

Exhibit Nine—Excerpts from a report by Walter H. Graves to the Commissioner of Indian Affairs, dated September 1, 1896 341

Index

Pa

Exhibits for Plaintiff (cont.):

Exhibit Ten—Letter from Commissioner of Indian Affairs to the Secretary of the Interior, dated June 8, 1928, and Section 8 of the Act of Congress, dated May 27, 1926 ____ 3

Exhibit Fourteen—Excerpts from a Letter from Acting Commissioner of Indian Affairs to Walter H. Graves, dated May 12, 1891 ____ 3

Exhibit Fifteen—Excerpts from a Report by M. P. Wyman to the Commissioner of Indian Affairs, dated October 22, 1891 ____ 3

Exhibit Fifty-five—Excerpts from a Letter from John Collier to Kenneth R. L. Simmons, dated March 9, 1935 ____ 5

Witnesses for Defendant:

Boyd, J. R.

—direct ____ 5

Campbell, Henry G.

—direct ____ 3

—cross ____ 5

—redirect ____ 5

Brock, W. J.

—direct ____ 5

—cross ____ 5

Index

Page

Witnesses for Defendant (Cont.):

Dethlefsen, Nickels
—direct 473
—cross 474
—recalled, direct 479
—recalled, cross 480

Fifield, R. H.
—direct 475
—cross 476

Goe, Frank
—direct 525

Hafner, Vincent K.
—direct 528
—cross 529

Henman, Joseph L.
—direct 525
—cross 528

Lewis, C. E.
—direct 438
—recalled, direct 560
—recalled, direct 565

Lillis, B. C.
—direct 472
—recalled, direct 474

Miller, Fred E.
—direct 514

Miller, Robert J.
—direct 516
—recalled, direct 522

Index

Page

Witnesses for Defendant (Cont.):

Miller, W. A.
—direct 522
—cross 524
—redirect 524

O'Donnell, I. D.
—direct 506
—cross 507
—redirect 507

Peters, Oliver
—direct 476
—cross 477
—recalled, direct 564

Rankin, Carl
—direct 471

Schroeder, Edward
—direct 511
—cross 512

Smith, Robert
—direct 478
—cross 479

Stevens, Dominic
—direct 507

Tschirgi, Matt H.
—direct 481
—cross 500
—redirect 505

Index

Page

Witnesses for Defendant (Cont.):

Walsh, Judy
—direct 533

Woodley, E. C.
—direct 508
—cross 510

Yellowtail, Robert
—direct 562

Witnesses for Plaintiff:

Boggess, Eugene
—direct 427
—cross 428
—redirect 428
—recross 429

Chandler, D. W.
—direct 418
—cross 419
—redirect 420
—recross 420

Cool, L. R.
—direct 406
—cross 407
—redirect 408
—recross 409

Deines, Fred
—direct 425
—cross 426

Index

Page

Witnesses for Plaintiff (Cont.):

Gentry, William
—direct 432
—cross 432
—redirect 433

Ground, Otto Bear
—direct 421

Hanna, W. S.
—direct 326
—cross 360
—recalled, direct 433
—cross 434
—redirect 436
—recross 437

Lamb, William A.
—direct 381
—cross 383

Lewis, C. E.
—direct 325
—recalled, direct 391
—cross 399
—redirect 404
—recalled, direct 567

Peck, H. A.
—direct 423
—cross 424
—redirect 425

Index

Page

itnesses for Plaintiff (Cont.):

Pitsch, Henry
—direct 429
—cross 429

Plimpton, W. B.
—direct 413
—cross 416

Richards, Ernest
—direct 427

Sloan, James J.
—direct 416
—cross 417

Spencer, Charles
—direct 409
—cross 411
—redirect 412

Tomlinson, Joe
—direct 421
—cross 422
—redirect 423

Weigand, Pete
—direct 431
—cross 431
—redirect 431
—recross 432

Weir, Oren
—direct 430
—cross 430

Index

	Page
Proceedings in U. S. C. C. A., Ninth Circuit	585
Caption	585
Order of submission	585
Order directing filing of opinion and decree	585
Opinion, Garrecht, J	586
Decree	591
Order denying petition for rehearing	591
Order staying issuance of mandate	592
Clerk's certificate	592
Order allowing certiorari	593

ATTORNEYS, NAMES AND ADDRESSES.

Mr. JOHN B. TANSIL,
United States District Attorney,

Mr. R. LEWIS BROWN,
Assistant United States District Attorney,
Both of Butte, Montana, and

Mr. KENNETH R. L. SIMMONS,
Dist. Counsel, of Billings, Montana,
Attorneys for Plaintiff and Appellant.

BURKE & COLLINS, and
FRANKLIN A. LAMB,
All of Billings, Montana,
Attorneys for Defendants and Appellees.

[1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana, Billings Division.

In Equity. No. 2962.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS R. POWERS, EDWARD SCHROEDER, M. H. TSCHIRGI, BERTHA TSCHIRGI, ANTLER LAND COMPANY, a Montana Corporation, B. B. BELKEN, EDITH B. BELKEN, JUDY WALSH, H. G. CAMPBELL, REG. PEARCE, JAY L. HENMAN, RUTH HENMAN, F. L. YATES, EMMA E. YATES, GEORGE S. BIGSON, JOSEPH A. GRAHAM, DOMINIC STEVENS, NICKELS DETHLEFSEN, MARY DETHLEFSEN, C. E. LINTHACUM, BILLIE MILLER and ROBERT J. MILLER,

Defendants.

Be it remembered that on June 20th, 1934, the Bill of Complaint was filed herein, in the words and figures following, to-wit: [2]

[Title of Court and Cause.]

BILL OF COMPLAINT.

Comes now James H. Baldwin, United States Attorney for the District of Montana, and acting under and by authority of the Attorney General of

the United States, brings this Bill of Complaint, and alleges:

I.

That the defendants, Thomas R. Powers, Edward Schroeder, M. H. Tschirgi, Bertha Tschirgi, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Reg. Pearce, Jay L. Henman, Ruth Henman, F. L. Yates, Emma E. Yates, George S. Gibson, Joseph A. Graham, Dominic Stevens, Nickels Dethlefsen, Mary Dethlefsen, C. E. Linthacum, Billie Miller and Robert J. Miller, are citizens and residents of the United States and the State of Montana, and that they reside within the confines of the Crow Reservation in Montana. That Antler Land Company is a corporation created, organized and existing under and by virtue of the laws of the State of Monfana.

II.

That on the 7th day of May, 1868, a treaty was entered into by and between the United States of America and the Crow Tribe or nation of Indians, wherein and whereby a certain tract of land [3] in the then Territory, but now the State of Montana, was set aside and reserved for the use of said Crow Indians, as a home and abiding place of said Indians, which said Treaty was ratified by the Senate of the United States on July 25, 1868 (15 Stat. L. 649) and proclaimed August 12, 1868 by the President of the United States, a copy of which Treaty is hereto attached, marked Exhibit "A" and made a part hereof. That said tract of land so

set aside for the use of said Indians, except only as the exterior boundaries of said reservation were altered, and the lands within the reservation diminished by further treaties between the United States and said Crow tribe or nation of Indians, (22 Stat. L. 42), (26 Stat. L. 1039), (33 Stat. L. 353, 357), has since May 7, 1868 been and now is an Indian Reservation, the home and abiding place of the said Crow tribe or nation of Indians and that the exterior boundaries of said Crow Indian Reservation since April 27, 1904, have been, and now are particularly described as follows:

Beginning at the intersection of the 107th Meridian and the boundary line between Montana and Wyoming; thence due North on the 107th Meridian to a point due East of the Northeast corner of the Fort Custer Military Reservation; thence due West to the Northwest corner of the Fort Custer Military Reservation; thence due South to the Southwest corner of the Fort Custer Military Reservation; thence due West to the intersection of the line between Sections ten and eleven, Township Two (2) South, Range Twenty-eight (28) East of the principal meridian of Montana; thence due North to the intersection of the Montana base line; thence due West to the intersection of a line running in a Southwesterly direction, following the top of the natural divide between the waters flowing into the Yellowstone and Clarks Fork Rivers upon the West and those flowing into Pryor Creek and West Pryor Creek on the East, said line ex-

tending from the Northwest corner of Section number Thirty-six (36), Township number Two (2) North, of Range Twenty-seven (27) East of the Principal Meridian of Montana, to the base of West Pryor Mountain; thence in a southwesterly direction along said line to the base of West Pryor Mountain; thence due South and up the North slope [4] of said Pryor Mountain on a true Meridian line to a point fifteen (15) miles due North from the established line between Montana and Wyoming; thence in a due Easterly course on a parallel of latitude to a point where it intersects the mid-channel of the Big Horn River; thence following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State Line; thence due East along the established line between Montana and Wyoming to the point of beginning; and that all lands within such boundaries now constitute the Crow Indian Reservation and are located within the State of Montana, and that the lands possessed by the defendants and the lands located under the Crow Indian Project system, hereinafter described, are located within the present boundaries of the Crow Indian Reservation.

III

That it was the intent and purpose of the United States of America in entering into the above mentioned treaties, that the said Indians who had therefore been a wandering, nomadic people, be encouraged to reside at one place and be trained and

encouraged to habits of industry, to till the soil, to care for their stock and to promote their civilization and to that end Paragraph 6 of the Treaty of May 7, 1868 was incorporated therein. That at the time of the adoption of the treaty of May 7, 1868 and the creation of the Crow Indian Reservation there was at that time reserved sufficient water of the reservation for the needs of the Crow tribe or nation of Indians for irrigation, domestic and other purposes. [4/30/35 H. H. W.]

IV.

That at the time of the adoption of said Treaty of May 7, 1868, and at all times since then and now, all of the lands within said reservation, were and are arid in character; that during all the times herein mentioned large portions of the lands embraced within the boundaries of said reservation are well fitted and adapted for pasturage and the feeding and grazing of horses, cattle and stock, and ever since the establishment of the Crow Reservation the United States and the Indians have had, and now have, large herds of cattle and large numbers of horses grazing upon the lands within the said reservation, through which the Little Big Horn River, Lodge Grass Creek and their tributaries flow. That other portions of the lands within said reservation, [5] to-wit, approximately 73,000 acres thereof, although arid, are and at all of the times herein mentioned were adapted for and susceptible to farming and cultivation and the pursuit of agri-

lture, and productive in the raising thereon of ass, grain and vegetables, but such portions are y and arid in character, and in order to make them oductive there is and at all of the times herein ntioned was required large quantities of water r the purpose of irrigating them, to-wit: one inch the acre, and require that the said water be ought to said land by the erection and construc- n of an irrigation project consisting of diver- n dams, head gates, canals, ditches, flumes and erals at large expense and at an expense impos- le of attainment upon the part of each individual lian living within said reservation; and without expenditure of such money and the establish- nt of such irrigation works it would be impos- e for the large majority of such Indians to farm cultivate such lands.

V.

hat at the time of the ratification of said Treaty May 7, 1868 and ever since said time continuing he present, Little Big Horn River was and is existing, unnavigable stream of water, rising in Big Horn Mountains and flowing in a North- direction through a well defined channel with ural banks, and in its natural course across the thern boundaries of the said reservation into and ugh the said reservation until it empties into the Horn River near Hardin, Montana, at a point oximately two miles South of the Northern dary of said reservation.

VI.

That the normal flow of the said Little Big Horn River and its tributaries, through the months of May, June, July, August, September and October of each year, which constitute the irrigation season, is 321 cubic feet per second for the month of May; 560 cubic feet per second for the month of June; 242 cubic feet per second for the month of July; 123 cubic feet per second for the month of August, and a lesser amount in the months of September and [6] October.

VII.

That at the time of the ratification of the Treaty of May 7, 1868, and at all of the times herein mentioned, Lodge Grass Creek was and it now is an existing unnavigable stream of water rising in the Big Horn Mountains and flowing Northerly through a well defined channel with natural banks and in its natural course across the Northern portion of said reservation and empties into the Little Big Horn River near Lodge Grass, Montana.

VIII.

That the normal flow of said Lodge Grass Creek through the months of May, June, July and August, September and October of each year, which constitute the irrigation season, within said reservation, with its tributaries is approximately 124 cubic feet per second of time for the month of May; 259 cubic feet per second of time for the month of June; 73 cubic feet per second for the month of

July; 26 cubic feet per second of time for the month of August and a lesser amount in the months of September and October. And at all times herein mentioned the normal flow of said Little Big Horn River and Lodge Grass Creek and their tributaries was insufficient to irrigate all of the lands within the boundaries of said Crow Indian Reservation, as diminished as aforesaid, susceptible to farming and cultivation and to which the waters of said streams can be carried by the irrigation system herein described.

IX.

That in order that all of the irrigable lands within the boundaries of said reservation as diminished, as aforesaid, may be brought under cultivation by the use of water thereon so far as there is water for such purposes available, and thus furthering and advancing the civilization and improvement of the said tribe of Indians as a whole, the Secretary of the Interior under and by virtue of the Acts of Congress duly and regularly enacted into law, directed that an irrigation project be commenced and then continued to its completion, which, when completed, would bring water on the greatest amount of land possible within said reservation, as [7] diminished, as aforesaid, which was best adapted for and susceptible to farming and cultivation and for which there was sufficient water for the irrigation of the same; said irrigation project to consist of dams placed within said Little Big Horn River and said Lodge Grass Creek, and

other streams of waters upon said reservation; headgates, canals and ditches for taking such waters out of such rivers and streams; canals, ditches and flumes for conveying the water upon the lands in such reservation, and lateral ditches, flumes and canals, for conveying the waters upon the lands allotted and thereupon and in the year 1885 the plaintiff commenced the construction of the Crow Irrigation Project by building the Reno Ditch which said ditch was capable of carrying approximately 60 cubic feet of water per second of time, and which has been enlarged to a capacity of 85 cubic feet per second of time, and in the year A. D. 1885 the plaintiff diverted from said Little Big Horn River through said ditch waters for the irrigation of lands within said reservation as diminished, as aforesaid, and each year since the plaintiff has diverted through said ditch waters of said river and used the same in irrigating the lands within said reservation as diminished; and thereafter plaintiff built other ditches, dams, headgates, flumes and canals as units of and parts of its said irrigation project, and as soon as the same were completed diverted the waters of said Little Big Horn River, Lodge Grass Creek and their tributaries from said streams, into such ditches and irrigation project and carried said waters through such project to and upon the lands within said reservation, and such waters were used, each year continuously thereafter to the present time for the farming and cultivation of said lands, and all of the waters so diverted were necessary

for such use and without the same, such arid lands could not have been farmed, cultivated and be made to produce.

X.

That subsequent to the building of the said Reno ditch the plaintiff has proceeded with the construction of said irrigation project by building its various units and has from said time constructed as a part of said Crow Irrigation Project the following [8] ditches, each of which has a carrying capacity and the construction of which were commenced in the years as follows:

Agency ditch, 1893, 209 cu. ft. of water per sec. of time;

Forty Mile ditch, 1893, 30 cu. ft. of water per sec. of time;

Upper Little Horn No. 2, 1907, 115 cu. ft. of water per sec. of time;

Lodge Grass No. 1, 1893, 200 cu. ft. of water per sec. of time;

Lodge Grass No. 2, 1903, 37 cu. ft. of water per sec. of time;

and in addition the plaintiff acquired a right in July 1922 to flow through the Bozeman Trail Ditch sufficient water to properly irrigate 1961.34 acres of allotted Indian lands in said reservation as diminished, as aforesaid.

XI.

That said ditches divert and take the water of the said Little Big Horn River, and Lodge Grass

Creek and their tributaries, and conduct and carry said water to and upon the Indian lands within said reservation.

XII.

That there are approximately 23,000 acres of said land susceptible of being cultivated if water were available lying under that portion of said irrigation project which diverts the waters of said Little Big Horn River, and Lodge Grass Creek and their tributaries, but that all of the waters flowing normally in said Little Big Horn River and Lodge Grass Creek and their tributaries are not sufficient to irrigate more than 15,000 acres of the lands lying under such irrigation project, within the limits of said Crow Indian Reservation, as diminished, as aforesaid, and that no part of said lands can be irrigated except with waters which flow from said Little Big Horn River and Lodge Grass Creek and their tributaries, through said Irrigation Project to said lands, as aforesaid. [9]

XIII.

That the said irrigation project, including that portion of it diverting the waters of said Little Big Horn River, and Lodge Grass Creek and their tributaries, so commenced in the year A. D. 1885, and continued to this time as aforesaid, has been constructed, built and erected at a cost and expense of approximately $2,000,000 of which amount approximately $1,600,000 was paid from the tribal funds of said Crow Tribe of Indians.

XIV.

That by reason of the drought now existing within the State of Montana and its water sheds and particularly within the confines of said Crow Indian Reservation as diminished, as aforesaid, and its water sheds, the normal flow of the waters of said Little Big Horn River, and Lodge Grass Creek and their tributaries, has been so lessened that there is now flowing in said streams approximately 218 cubic feet of water per second of time, and that of such flow 84 cubic feet of water per second of time is being wrongfully and unlawfully taken and diverted by the defendants as hereinafter more fully set out.

XV.

That the entire present flow of waters in said streams and their tributaries is wholly insufficient to irrigate the lands lying under said irrigation project, susceptible of irrigation and cultivation and included within the boundaries of said Crow Indian Reservation as diminished, as aforesaid. [10].

XVI.

That the defendant Thomas R. Powers, is in control and possession of the following lands, lying within the Crow Indian Reservation, as diminished, as aforesaid, particularly described as follows:

All of Section Nineteen (19); the Northwest Quarter (NW¼) of Section Twenty (20); Lot one (1), the East Half of the Northwest Quarter (E½NW¼), the Northeast Quarter

(NE¼), the North Half of the Southeast Quarter (N½SE¼), the Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Thirty (30); the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section Thirty-one (31) all in Township Nine (9) South, Range Thirty-four (34), East, M. P. M., located in Big Horn County, Montana,

and that said defendant is now wrongfully, and unlawfully diverting, and threatens to continue to divert from the waters of the said Little Big Horn River five (5) cubic feet of water per second of time of such waters and is wrongfully and unlawfully, using the same upon the lands above described, and unless enjoined and restrained will continue so to do and that no part of said lands lie under the said irrigation project.

XVII.

That the defendant Edward Schroeder, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The East Half of the Northeast Quarter (E½NE¼), the Northeast Quarter of the Southwest Quarter (NE¼SW¼), the Northwest Quarter of the Southeast Quarter (NW¼ SE¼) of Section Seventeen (17): the Northeast Quarter (NE¼) of Section Seventeen (17); the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of Section Seventeen

(17); all in Township Nine (9) South, Range Thirty-four (34) East, M. P. M., located in Big Horn County, Montana,

and that said defendant, Edward Schroeder, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of the said Little Big Horn River two (2) cubic feet per second of such waters and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project. [11]

XVIII.

That the defendants, M. H. Tschirgi, Bertha Tschirgi and the Antler Land Company, a Montana Corporation, through its agents, servants and employees, are in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The West Half (W½), the Southwest Quarter of the Southeast Quarter (SW¼SE¼) of Section Nine (9); the Northeast Quarter of the Northwest Quarter (NE¼NW¼), the Northwest Quarter of the Northeast Quarter (NW¼NE¼) of Section Sixteen (16), Township Nine (9) South, Range Thirty-four (34) East, M. P. M., located in Big Horn County, Montana,

The Northeast Quarter (NE¼), the North Half of the Southeast Quarter (N½SE¼), the Southeast Quarter of the Southeast Quarter

(SE¼SE¼) of Section Nine (9); the Northwest Quarter (NW¼), the North Half of the Southwest Quarter (N½SE¼), the Southwest Quarter of the Southwest Quarter (SW¼ SW¼) and Lot One (1), Section Ten (10); the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section Sixteen (16), the North Half of the Northwest Quarter (N½ NW¼) of Section Fifteen (15), Lot Seven (7), Section Three (3); Lot One (1), the Southeast Quarter of the Southeast Quarter (SE¼ SE¼) of Section Two (2); the North Half of the Northeast Quarter (N½NE¼), the Southwest Quarter of the Northwest Quarter (SW¼ NW¼) of Section Eleven (11); the Northwest quarter of the Southeast Quarter (NW¼SE¼) of Section One (1), all in Township Nine (9) South, Range Thirty-four (34) East, M. P. M. The Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Thirty-five (35), Township Eight (8) South, Range Thirty-four (34) East, M. P. M. all in Big Horn County, Montana.

The Southeast Quarter of the Northeast Quarter (SE¼NE¼) of Section Eleven (11), Township Nine (9) South, Range Thirty-four (34) East, M. P. M., located in Big Horn County, Montana.

The Southwest Quarter of the Northeast Quarter (SW¼NE¼) of Section Eleven (11), Township Nine (9) South, Range Thirty-four

(34) East, M. P. M., Big Horn County, Montana,

and the said defendants, M. H. Tschirgi, Bertha Tschirgi, and the Antler Land Company, a Montana Corporation, through its agents, servants and employees are now wrongfully and unlawfully diverting, and threaten to continue to divert from the waters of said Little Big Horn River Twenty-two (22) cubic feet per second of such waters, and are wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XIX.

That the defendants, B. B. Belken, Edith G. Belken and Judy Walsh, are in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

[12]

The Southeast Quarter of the Northwest Quarter (SE¼NW¼) of Section Twenty-eight (28), Township Eight (8) South, Range Thirty-five (35) East, M. P. M., Big Horn County, Montana,

and the said defendants, B. B. Belken, Edith G. Belken and Judy Walsh, are now wrongfully and unlawfully diverting, and threaten to continue to divert from the waters of the said Little Big Horn

River four (4) cubic feet per second of such water, and are wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XX.

That the defendant, H. G. Campbell, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

> The Southwest Quarter of the Northwest Quarter (SW¼NW¼) of Section Twenty-eight (28), Township Eight (8) South, Range Thirty-five (35) East, M. P. M., Big Horn County, Montana,

and that said defendant H. G. Campbell is now wrongfully and unlawfully diverting and threatens to continue to divert from the waters of the said Little Big Horn River five (5) cubic feet per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXI.

That the defendant, Reg. Pearce, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The Southeast Quarter of the Southwest Quarter (SE¼SW¼) of Section Twenty-two (22), Township Eight (8) South, Range Thirty-five (35) East, M. P. M., Big Horn County, Montana,

and that the said defendant, Reg. Pearce, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of a slough running into Pass Creek, which is a tributary of the Little Big Horn River, one (1) cubic foot per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project. [13]

XXII.

That the defendants, Jay L. Henman and Ruth Henman, are in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

All of Section Three (3) the Southeast Quarter of the Northeast Quarter (SE¼NE¼) the Northwest Quarter of the Southeast Quarter (NW¼SE¼), the East Half of the Southeast Quarter (E½SE¼) of Section Four (4), Township Five (5) South, Range Thirty-five (35) East, M. P. M., Big Horn County, Montana,

and that the said defendants, Jay L. Henman and Ruth Henman, are now wrongfully and unlawfully

diverting, and threaten to continue to divert from the waters of said Little Big Horn River six (6) cubic feet per second of such waters, and are wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXIII.

That the defendants, F. L. Yates and Emma E. Yates, are in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

> The Northeast Quarter (NE¼) of Section Seventeen (17), Township Nine (9) South, Range Thirty-three (33) East, M. P. M., Big Horn County, Montana,

and that the said defendants, F. L. Yates and Emma E. Yates, are now wrongfully and unlawfully diverting, and threaten to continue to divert from the waters of Lodge Grass Creek three (3) cubic feet per second of such waters, and are wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXIV.

That the defendant, George S. Gibson, is now in control, and possession of the following lands lying within the Crow Indian Reservation, particularly described as follows:

The East Half of the Southwest Quarter of the Northeast Quarter (E½SW¼NE¼), the Northwest Quarter of the Northwest Quarter (NW¼NW¼), the Southwest Quarter of the Northeast Quarter (SW¼NE¼) of Section Thirty-five (35); the North Half (N½) of Section Thirty-six (36), all in Township Eight (8) South, Range Thirty-three (33) East, M. P. M., Big Horn County, Montana, [14]

nd that the said defendant, George S. Gibson, is ow wrongfully and unlawfully diverting, and hreatens to continue to divert waters of said Lodge rass Creek, and is wrongfully and unlawfully sing the same upon the lands above described, and nless enjoined and restrained will continue so to o, and that no part of said lands lie under the aid irrigation project.

XXV.

That the defendant, Joseph A. Graham, is now control and possession of the following lands, ing within the Crow Indian Reservation, parcularly described as follows:

The Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Twenty-six (26); the Southwest Quarter of the Southwest Quarter (SW¼SW¼); the East Half of the Southwest Quarter (E½SW¼); the Southeast Quarter (SE¼) of Section Twenty-five (25), all in Township Eight (8) South, Range Thir-

ty-three (33) East, M. P. M., located in Big Horn County, Montana,

and that the said defendant, Joseph A. Graham, is now wrongfully and unlawfully diverting, and threatens to continue to divert waters of the said Lodge Grass Creek, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under said irrigation project.

XXVI.

That the defendant, Dominic Stevens, is now in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The Southwest Quarter of the Southeast Quarter (SW¼SE¼) of Section Twenty-four (24); the North Half of the Northwest Quarter (N½NW¼) of Section Twenty-five (25), Township Eight (8) South, Range Thirty-three (33) East, M. P. M., Big Horn County, Montana,

and that the said defendant, Dominic Stevens, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of said Lodge Grass Creek eight (8) cubic feet per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will

continue so to do, and that no part of said lands lie under the said irrigation project. [15]

That the defendants, Nickels Dethlefsen and Mary Dethlefsen, are in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Thirteen (13), Township Eight (8) South, Range Thirty-three (33) East, M.P.M.; the Southeast Quarter of the Northwest Quarter (SE¼ NW¼), Northeast Quarter of the Southwest Quarter (NE¼SW¼), the North Half of the Southeast Quarter (N½SE¼), of Section Eighteen (18), The Southeast Quarter of the Southwest Quarter (SE¼SW¼) the South Half of the Southeast Quarter (S½SE¼) of Section Seven (7), Township Eight (8) South, Range Thirty-four (34) East, M.P.M., Big Horn County, Montana.

Lots Three (3) and Four (4), the Southeast Quarter of the Southwest Quarter (SE¼ SW¼), the South Half of the Southeast Quarter (S½SE¼) of Section Eighteen (18), Township Eight (8) South, Range Thirty-four (34) East, M.P.M., Big Horn County, Montana,

and that the said defendants, Nickels Dethlefsen and Mary Dethlefsen, are now wrongfully and unlawfully diverting, and threaten to continue to di-

vert from the waters of said Lodge Grass Creek six (6) cubic feet per second of such waters, and are wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXVII.

That the defendant, C. E. Linthacum, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The Northeast Quarter of the Southwest Quarter (NE¼SW¼), the North Half of the Southeast Quarter (N½SE¼), the Northeast Quarter (NE¼) of Section Seven (7), Township Eight (8) South, Range Thirty-four (34) East, M.P.M., Big Horn County, Montana,

and that the said defendant, C. E. Linthacum, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of said Lodge Grass Creek three (3) cubic feet per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXVIII.

That the defendant, Billie Miller, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows: [16]

The East Half of the Northwest Quarter (E½NW¼), the Northeast Quarter (NE¼) of Section Twenty-Nine (29), Township Seven (7) South, Range Thirty-four (34) East, M.P.M., Big Horn County, Montana,

and that the said defendant, Billie Miller, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of said Lodge Grass Creek ten (10) cubic feet per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXIX.

That the defendant, Robert J. Miller, is in control and possession of the following lands, lying within the Crow Indian Reservation, particularly described as follows:

The Northwest Quarter (NW¼), the North Half of the Southwest Quarter (N½SW¼), The Southeast Quarter of the Southwest Quarter (SE¼SW¼), The Southwest Quarter of the Southwest Quarter (SW¼SW¼), the Southeast Quarter (SE¼) of Section Twenty-one (21), Township Seven (7) South, Range Thirty-four (34) East M.P.M., Big Horn County, Montana,

and that the said defendant, Robert J. Miller, is now wrongfully and unlawfully diverting, and threatens to continue to divert from the waters of

said Lodge Grass Creek Eight (8) cubic feet per second of such waters, and is wrongfully and unlawfully using the same upon the lands above described, and unless enjoined and restrained will continue so to do, and that no part of said lands lie under the said irrigation project.

XXX.

That in diverting and using the waters of said Little Big Horn River and Lodge Grass Creek and their tributaries, as aforesaid, the said defendants and each of them have been acting entirely without right and wrongfully and unlawfully, and without the consent of this plaintiff or any of its officers or agents, the Superintendent of the Crow Reservation, the Crow Tribe of Indians, or of any one else who could lawfully give such consent, obstructed the free and uninterrupted flow of waters within said Little Big Horn River and Lodge Grass Creek and their tributaries, by the building of dams therein, above the points of diversion in each of said streams of the ditches and irrigation system of this plaintiff and said Crow tribe [17] of Indians, and thereby have diverted and taken from said streams large quantities of water for use in irrigating the lands so possessed by them, and which, except for such obstructions and diversions, would flow down said streams into and thro said irrigation project and upon the lands susceptible of cultivation lying under said project, and which said waters are necessary for the cultivation of such lands and the growing of crops thereon, and

continue to so obstruct the free flow of water in such streams and to take and divert the waters there from and to deprive those entitled to the use of said waters from the use and benefit thereof, and threaten to and unless enjoined and restrained by the immediate order of this court will continue to so wrongfully and unlawfully obstruct the free flow of waters in said streams, and divert and take the same therefrom and will continue to use the same, and keep the same from those lawfully entitled thereto and the use and benefit thereof.

XXXI.

That by reason of such wrongful and unlawful diversions and each of them, and the taking of said waters as aforesaid, great and irreparable injury, loss, and damage has been suffered by the plaintiff and its Indian wards, allottees of said land lying under said irrigation project, and such irreparable injury, loss and damage will continue to be suffered by plaintiff and its said Indian wards, so long as said water is so diverted and taken, that the crops growing upon such lands of plaintiff's said Indian wards are being damaged and destroyed by reason of the taking of such water, needed for the preservation of said crops. That great and irreparable loss and damage is being caused plaintiff and it's said Indian wards by the interference of the defendants and each of them, with said irrigation project so built and constructed as aforesaid, and by the taking therefrom of waters lawfully belonging to this plaintiff and it's said Indian

wards, and to which it and they are entitled to have flow to and through the said irrigation project:

XXXII.

That said plaintiff has no plain, speedy, adequate or complete remedy at law, or otherwise, nor any remedy whatsoever except in a Court of Equity where such matters are cognizable. [18]

WHEREFORE said plaintiff prays that a preliminary injunction shall issue herein after due notice of this application therefor and that defendants be ordered on a day fixed to show cause why said preliminary injunction should not be granted, enjoining and restraining the defendants and each of them, their servants, agents and employees from doing the acts complained of. That pending the hearing thereof a restraining order issue restraining the defendants, their agents, servants or employees from in any manner diverting the waters of Lodge Grass Creek and the Little Big Horn River and the tributaries thereof, and from maintaining such dams and ditches aforesaid, and that upon the final determination of this suit, a permanent injunction issue, enjoining and restraining the said defendants, their agents, servants or employees, and all persons claiming under, through or by them, from maintaining or using said dams and ditches, as aforesaid, and from diverting by means of said dams and ditches or in any other manner any of the waters fromLodge Grass Creek or Little Big Horn River and their tributaries; that plaintiff have and recover its costs

and disbursements herein expended, and that said plaintiff have such other and further relief as shall appear to the Court meet and proper.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
By R. LEWIS BROWN
ROY F. ALLAN
DONALD J. STOCKING
Ass't. United States Attorney.
KENNETH R. L. SIMMONS
Dist. Counsel, Dept. of Interior, U. S. I. I. S.

United States of America
District of Montana—ss.

JAMES H. BALDWIN, being first duly sworn, on oath, deposes and says: That he is a duly appointed, qualified and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

JAMES H. BALDWIN

Subscribed and sworn to before me this 19th day of June, 1934.

[Seal] H. L. ALLEN
Deputy Clerk of said Court, District of Montana. [19]

EXHIBIT "A"

TREATY WITH THE CROWS, 1868

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed to once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace there-

with, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefor.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along the said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such

other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid. [20]

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school; which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be rected on said reservation, near the other build- ngs herein authorized, a good steam circular saw- ill, with a grist-mill and shingle-machine attached, he same to cost not exceeding eight thousand ollars.

ARTICLE 4. The Indians herein named agree, hen the agency-house and other buildings shall be onstructed on the reservation named, they will ake said reservation their permanent home, and ey will make no permanent settlement elsewhere, ut they shall have the right to hunt on the unoccu- ied lands of the United States so long as game ay be found thereon, and as long as peace sub- sts among the whites and Indians on the borders the hunting districts.

ARTICLE 5. The United States agrees that the ent for said Indians shall in the future make his me at the agency-building; that he shall reside ong them, and keep an office open at all times r the purpose of prompt and diligent inquiry into ch matters of complaint, by and against the In- ns, as may be presented for investigation under provisions of their treaty stipulations, as also the faithful discharge of other duties enjoined him by law. In all cases of depredation on person property, he shall cause the evidence to be taken writing and forwarded, together with his finding, the Commissioner of Indian Affairs, whose de- on shall be binding on the parties to this treaty.

RTICLE 6. If any individual belonging to tribes of Indians, or legally incorporated with

them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the [21]

character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for

each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following articles, to-wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President [22] shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the

period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described, and commence farming, one good American cow and one good-well-broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by, at least a majority of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

W. T. SHERMAN,
Lieutenant-General.
WM. S. HARNEY,
Brevet Major-General and
Peace Commissioner.
ALFRED H. TERRY,
Brevet Major-General.
C. C. AUGUR,
Brevet Major-General.
JOHN B. SANBORN
S. F. TAPPAN.
ASHTON S. H. WHITE,
Secretary.

Che-ra-pee-ish-ka-te,
Pretty Bull, his x mark [Seal]
Chat-sta-he,
Wolf Bow, his x mark [Seal]
Ah-be-che-se,
Mountain Tail, his x mark [Seal]
Kam-ne-but-sa,
Black Foot, his x mark [Seal]
De-sal-ze-cho-se,
White Horse, his x mark [Seal]

Chin-ka-she-arache,
Poor Elk, his x mark [Seal]
E-sa-woor,
Shot in the Jaw, his x mark [Seal]
E-sha-chose,
White Forehead, his x mark [Seal]
——Rooka,
Pounded Meat, his x mark [Seal]
De-ka-ke-up-se,
Bird in the Neck, his x mark [Seal]
Me-na-che,
The Swan, his x mark [Seal]

Attest:
GEORGE B. WILLIS,
Phonographer.
JOHN D. HOWLAND
ALEX GARDNER
DAVID KNOX
CHAS. FREEMAN
JAS. C. O'CONNOR.

[Endorsed]: Filed June 20, 1934. [23]

Thereafter, on September 29, 1934, Stipulation to amend complaint was filed herein, in the words and figures following, towit: [24]

[Title of Court and Cause.]

STIPULATION.

It is stipulated and agreed by and between the attorneys for the plaintiff and Johnston, Coleman

& Jameson, Attorneys for the defendants, Dominic Stevens, Nickels Dethlefsen and Mary Dethlefsen, and Burke & Collins and Ben Harwood, Attorneys for all other defendants except the defendant, C. E. Linthacum, who has not appeared, in the above cause, as follows:

I.

That the bill of complaint on file herein be amended in Paragraph III, on page three thereof, by adding to the end of Paragraph III (after the word therein) the following:

> "That at the time of the adoption of the treaty of May 7, 1868 and the creation of the Crow Indian Reservation there was at that time reserved sufficient water of the reservation for the needs of the Crow tribe or nation of Indians for irrigation, domestic and other purposes." [25]

II.

That the motions to dismiss, on file herein, shall stand as motions to dismiss to the bill of complaint as and when amended.

III.

That the Clerk of the above Court may make the foregoing amendments on the original bill of complaint immediately after the filing of this stipulation.

Dated at Billings, Montana, this 24th day of September, 1934.

JAMES H. BALDWIN
R. LEWIS BROWN
ROY F. ALLAN
DONALD J. STOCKING
KENNETH R. L. SIMMONS
Attorneys for Plaintiff.

JOHNSTON, COLEMAN & JAMESON,
By W. M. JOHNSTON
Attorneys for Defendants Dominic Stevens, Nickels Dethlefsen and Mary Dethlefsen.

BURKE & COLLINS,
By T. H. BURKE
BEN HARWOOD
Attorneys for remaining defendants except C. E. Linthacum.

[Endorsed]: Filed Sept. 29, 1934. [26]

Thereafter, on October 10, 1934, the

JOINT AND SEVERAL ANSWERS OF DEFENDANTS M. H. TSCHIRGI, ET AL,

were filed herein, in the words and figures following, towit: [27]

[Title of Court and Cause.]

Come now M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller, of above named defendants, and for answer to plaintiff's complaint herein, say:

I.

1. These answering defendants allege that said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

2. Allege that said bill of complaint is insufficient in that it does not state the time nor the amount of any specific appropriation of water from Little Big Horn River nor from Lodge Grass Creek, nor from any tributary of either said river or [28] said creek, for which reason it cannot be determined from said bill of complaint when plaintiff herein claims to have made a specific appropriation of any of said waters nor the amount of any such appropriation.

3. Allege that said bill of complaint, as to any water right appropriations which may have been

made by plaintiff, does not set forth the necessary facts showing any such appropriations but merely pleads conclusions of law with reference thereto.

4. Allege that said bill of complaint is—

(a) Ambiguous;

(b) Uncertain; and

(c) Indefinite,

in that it cannot be determined from said bill of complaint when any particular alleged appropriation of water was made by plaintiff, nor the amount of any such alleged appropriation of water, nor the means by which said appropriation of water was made, nor the use to which the water alleged to have been appropriated was applied.

II.

1. Admit that the defendants named in paragraph I of said bill of complaint are citizens and residents of the United States and of the state of Montana; that they reside within the confines of the Crow Reservation in Montana, and that the defendant Antler Land Company is a corporation created, organized and existing under and by virtue of the laws of the state of Montana.

2. Admit that on May 7, 1868, a treaty was entered into between the United States of America and the Crow Tribe or nation of Indians as described in paragraph II of said bill of complaint; that exhibit "A", attached to said bill of com- [29] plaint is a true copy of said treaty; that the exterior boundaries of said Crow Indian Reservation since April 27,

1904, have been, and now are, as described in said paragraph; that the lands within such boundaries now constitute the Crow Indian Reservation, and are located within the state of Montana, and that the lands owned and possessed by the above named defendants and described in said bill of complaint are located within the present boundaries of said Crow Indian Reservation; deny that there is any Crow Indian Project Irrigation system, but admit that all lands irrigable through ditches constructed by the United States on said Crow Indian Reservation are located within the present boundaries of said reservation.

3. These defendants deny that they have any knowledge or information as to the intent and purpose of the United States of America in entering into the treaty, or treaties, mentioned in said bill of complaint and deny that they have any knowledge or information as to the purpose of incorporation paragraph or article six in said treaty of May 7, 1868. Admit that in the adoption of the treaty of May 7, 1868, and in the creation of Crow Indian Reservation, there was at that time reserved sufficient water of the reservation for the needs of the Crow tribe or nation of Indians for irrigation, domestic or other purposes.

4. Admit that at the time of the adoption of said treaty of May 7, 1868, and at all times since then, and now, all of the lands within said reservation were and are arid in character; that during all of the times mentioned in said bill of complaint large

portions of said lands were adapted for pasturage and the feeding and grazing of horses, cattle and other livestock; deny that ever since the establishment of the Crow Reservation the United States and said Indians have had, and now have, large [30] herds of cattle and large numbers of horses grazing upon the lands within said reservation, through which the Little Big Horn River, Lodge Grass Creek, and their tributaries, flow; admit that there are some lands within said reservation which, although arid, are, and at all of the times mentioned in said bill of complaint were, adapted for and susceptible to farming and cultivation, and the production of grass, grain and vegetables thereon; deny that they have any knowledge as to the amount of the lands so adapted to agricultural purposes; admit that such lands are arid in character and that in order to make them productive water is required for the purpose of the irrigation thereof; deny that said lands require one miner's inch of water for the irrigation of each acre, or any amount in excess of one-half of a miner's inch of water per acre for the proper irrigation thereof; deny that the irrigation ditches constructed on the Crow Indian Reservation by the United States of America for the irrigation of lands on said reservation constitute an irrigation project; allege that each of said ditches constitutes a separate project; admit that in order to divert water from said Little Big Horn River, Lodge Grass Creek, and their tributaries, for the irrigation of said lands, it is necessary to construct diversion

ams, headgates, canals, ditches, flumes and laterals, t considerable expense, the amount of which is unnown to these answering defendants; deny that it s impossible for each individual Indian living ithin such reservation, or for a considerable numer of such Indians acting together, to construct and aintain the necessary irrigation ditches and appurenances for the irrigation of their lands within said eservation, and deny that without the expenditure f money by the Government of the United States, nd the establishment of such irrigation works as ave been constructed by it, it would be impossible or the majority of said Indians to farm and cultiate their lands on said reservation. [31]

5. Admit that at the time of the ratification of aid treaty of May 7, 1868, and ever since then, the ittle Big Horn River was, has been, and now is, n existing, unnavigable stream of water, and that rises in the Big Horn mountains, flows in a northrly direction through a well defined channel, with atural banks, and in its natural course crosses the outhern boundary of said reservation and flows nto and through said reservation until it empties nto the Big Horn River near Hardin, Montana.

6. Deny that they have any knowledge or inforation as to the normal flow of the said Little Big orn River and its tributaries, throughout the onths of May, June, July, August, September or ctober in any year.

7. Admit that at the time of the ratification of e treaty of May 7, 1868, and at all of the times

mentioned in said bill of complaint, Lodge Grass Creek was, and now is, an existing unnavigable stream of water rising in the Big Horn mountains and flowing northerly through a well defined channel with natural banks and in its natural course crosses the northern portion of said reservation and empties into the Little Big Horn River near Lodge Grass, Montana.

8. Deny that they have any knowledge or information as to the normal flow of said Lodge Grass Creek through the months of May, June, July, August, September or October of any year, and deny that the normal flow of said Little Big Horn River, Lodge Grass Creek, and their tributaries, are insufficient to irigate all of the lands within the boundaries of said Crow Indian Reservation, diminished as set out in said Bill of Complaint, susceptible to farming and cultivation and to which the waters of said streams can be carried by the irrigation ditches described in said bill of complaint.

[32]

9. Deny that the Secretary of the Interior, under or by virtue of any Act of Congress directed that an irrigation project be commenced and continued to its completion, which, when completed, would bring water onto the greatest amount of land possible within such reservation, diminished as alleged in said bill of complaint; deny that the irrigation ditches constructed on said reservation and described in said bill of complaint, are all parts of any one irrigation project or system; deny that they have any knowledge or information as to

whether said irrigation ditches were constructed for furthering of advancing the civilization and improvement of said Crow Tribe of Indians; admit that the irrigation projects or systems constructed on said Crow Indian Reservation described in said bill of complaint consist of dams in said Little Big Horn River, said Lodge Grass Creek, and their tributaries, headgates, canals, ditches, flumes and lateral ditches, for the purpose of conveying water from said streams upon allotted lands on said Crow Indian reservation; deny that the construction of the Reno ditch was the commencement of the construtions of a Crow irrigation project, or that the construction of said ditch was begun in the year 1885, or that its carrying capacity was originally 60 cu. ft. of water per second of time, or that it has been enlarged to a carrying capacity of 85 cu. ft. per second of time, or that any water was diverted through said ditch in the year 1885 from the Little Big Horn River for the irrigation of lands within said reservation; admits that since the construction of said Reno ditch, the date of which is unknown to these answering defendants, water has been diverted through said ditch for the irrigation of certain lands within said reservation; admit that thereafter plaintiff built other ditches, dams, headgates, flumes and canals through which waters were diverted from said river, creek and their tributaries to and upon lands within said reservation, but deny that the same [33] were units of, or parts of, any one irrigation project; admit that since said ditches, canals, flumes, dams and headgates were

constructed, the time of the construction of which is unknown to these defendants, waters from said river, creek and their tributaries have been conveyed to lands within said reservation, and have been used to some extent sporadically in the irrigation of said lands and for the purpose of farming and cultivating the same, and admit that said lands are semi-arid and could not be farmed, cultivated and made to produce profitably without the use of water for irrigation thereof.

10. Admit that after the construction of said Reno ditch plaintiff has constructed other irrigation ditches, with the necessary appurtenances, for the irrigation of lands on said reservation, but deny that the same were or are parts of the same irrigation project; admit that plaintiff has constructed the Agency ditch, Forty Mile Ditch, Upper Little Horn No. 2 ditch, Lodge Grass No. 1 ditch, and Lodge Grass No. 2 ditch, but deny that they have any knowledge or information as to the year in which any one of said ditches was constructed, or as to the carrying capacity of any one of said ditches; deny that they have any knowledge or information as to what right, if any, plaintiff may have acquired to conduct water through the Bozeman Trail ditch, or the number of acres of allotted Indian lands which plaintiff may irrigate with water conducted through said ditch; allege that there are about 4000 acres of land lying under said Bozeman Trail ditch which can be and are irrigated by water conveyed through said ditch from the Little Big Horn River, which lands are owned,

occupied and farmed by persons who are not members of the Crow tribe of Indians, who should be made parties defendant in this suit in order to enable the Court to [34] enter a proper decree adjudicating all water rights in and to the waters of said Little Big Horn River, Lodge Grass Creek, and their tributaries.

11. Admit that the ditches constructed by plaintiff, as pleaded in its bill of complaint, divert and take some of the waters of said Little Big Horn River, Lodge Grass Creek, and their tributaries, and conduct and carry a portion of said waters to and upon certain Indian lands within said reservation.

12. Deny that there are approximately 23,000 acres of land susceptible of cultivation if water were available, which lie under the ditches described in said bill of complaint; deny that they have any knowledge or information as to the number of acres of land which are susceptible of being cultivated, that can be irrigated with water conducted through said ditches from said Little Big Horn River, Lodge Grass Creek, and their tributaries; deny that the normal flow of water from said river, creek and their tributaries is not sufficient to irrigate more than 15,000 acres of land lying under said ditches and within the limits of said reservation; admit that no part of said lands can be irrigated except with waters which flow from said river, creek and their tributaries; and deny that said lands cannot be irrigated in any other way than through the ditches constructed by plaintiff and described in its bill of complaint.

13. Deny that the ditches described in the bill of complaint herein constitute an irrigation project but allege that each ditch, with its appurtenances, is a separate irrigation project; deny that any irrigation project was commenced by plaintiff on said reservation in the year 1885, or that any such irrigation project was continued from that time to the present, and deny that they have any knowledge or information as to the [35] cost and expense of construction of ditches by plaintiff on said Crow Indian reservation, or the amount thereof which has been paid from tribal funds of the Crow tribe of Indians.

14. Admit that a drouth was existing within the State of Montana at the time the bill of complaint herein was filed, but deny that at that time there were not more than 218 cu. ft. of water per second of time flowing in said river, creek, and their tributaries, and deny that at that time a flow of 84 cu. ft. of water per second of time was being wrongfully or unlawfully or otherwise taken or diverted by the defendants named in the bill of complaint from said river, creek and their tributaries, and deny that they have any knowledge or information as to the amount of water then flowing in said river, creek and their tributaries, or the amount of water then diverted therefrom by the defendants named in said bill of complaint.

15. Deny that the flow of water in said streams, and their tributaries, at the time said bill of complaint was filed, was insufficient to irrigate the lands lying under the various ditches, described in

said bill of complaint, which are susceptible of irrigation and cultivation, and which are included within the boundaries of said Crow Indian reservation, diminished as stated in said bill of complaint.

16. Deny that answering defendants M. H. Tschirgi and Bertha Tschirgi, or either of them, are in possession of, have any control over or interest in the lands described in paragraph XVIII of the bill of complaint herein, and aver that the allegations seeking to charge them as in possession and control of said lands are not true.

Admit that answering defendant, the Antler Land Company, a Montana corporation, through its agents, servants [36] and employees, is now, and at the time of the filing of the bill of complaint herein was, in control and possession of the lands described in paragraph XVIII of the bill of complaint, but deny that it has ever wrongfully and unlawfully diverted any waters from said Little Big Horn River, or that it has wrongfully or unlawfully used any of said waters from said river upon the lands above described; admit that it has diverted waters from said Little Big Horn River sufficient for the proper irrigation of 706.8 acres of said land, but alleges that such diversion was lawful and under valid appropriations of water from said river for the irrigation of said 706.8 acres of land, and admit that no part of its said lands lies under any one of the ditches described in the bill of complaint herein, except the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) of Section

Eleven (11), Township Nine (9) South of Range Thirty-four (34) East.

17. Admit that answering defendants B. B. Belken, Edith G. Belken and Judy Walsh, are now, and at the time of the filing of the complaint herein were, in control and possession of the lands described in paragraph XIX of the bill of complaint and also the South Half of the Northeast Quarter (S½NE¼) of Section Twenty-eight (28), Township Eight (8) South of Range Thirty-Five (35) East, not described in the bill of complaint, but deny that they have ever wrongfully or unlawfully diverted any waters from said Little Big Horn River, or that they have wrongfully or unlawfully used any of said waters from said river upon the land above described; admit that they have diverted waters from said Little Big Horn River sufficient for the proper irrigation of 80.3 acres of said lands, but allege that such diversion was lawful and under valid appropriations of water from said river for the irrigation of said 80.3 acres of lands, [37] and admit that no part of their said lands lies under any one of the ditches described in the bill of complaint herein.

18. Admit that answering defendants H. G. Campbell is now, and at the time of the filing of the complaint herein, was in control and possession of the land described in paragraph XX of the bill of complaint, but deny that he has ever wrongfully or unlawfully diverted any waters from said Little Big Horn River, or that he has wrongfully or unlawfully used any of said waters from said

iver upon the lands above described. Admit that o part of his said lands lies under any one of the itches described in the bill of complaint herein. Allege that he has diverted waters from said ittle Big Horn River sufficient for the proper rrigation of 73.6 acres of said land in the South Ialf of the Southwest quarter (S½SW¼), North- ast Quarter of Southwest Quarter (NE¼SW¼) f Section Twenty-eight (28), Township Eight (8) outh of Range Thirty-five (35) East, and allege hat such diversion was lawful and under valid ppropriations of water from said river for the rrigation of said 73.6 acres of land.

19. Admit that answering defendants Jay L. Ienman and Ruth Henman are now, and at the me of the filing of the complaint herein were, in ontrol and possession of the lands described in aragraph XXII of the bill of complaint, but eny that they have ever wrongfully or unlawfully iverted any waters from said Little Big Horn iver or that they have wrongfully or unlawfully sed any of said waters from said river upon the nd above described; admit that they have diverted aters from said Little Big Horn River sufficient or the proper irrigation of 58.6 acres of said land, ut allege that such diversion was lawful and un- er valid appropriations of water from said river. 38] for the irrigation of said 58.6 acres of land, nd admit that no part of their said lands lies nder any one of the ditches described in the bill complaint herein.

20. Admit that answering defendant Billie Miller is now, and at the time of the filing of the complaint herein was, in control and possession of the lands described in paragraph XXVIII of the bill of complaint. Allege that defendant Billie Miller is also in control and possession of the South Half of Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$) Section Twenty (20), Township Seven (7) South of Range Thirty-four (34) East. Deny that he has ever wrongfully or unlawfully diverted any waters from said Lodge Grass Creek, or that he has wrongfully or unlawfully used any of said waters from said creek upon any of the lands above described. Admit that he has diverted waters from said Lodge Grass Creek sufficient for the proper irrigation of 111.6 acres of said lands, but allege that such diversion was lawful and under valid appropriations of water from said creek for the irrigation of said 111.6 acres of land, and admit that no part of his said lands lies under any one of the ditches described in the bill of complaint herein.

21. Admit that answering defendant Robert J. Miller is now, and at the time of the filing of the bill of complaint herein was, in control and possession of the land described in paragraph XXIX of the bill of complaint, but deny that he has ever wrongfully or unlawfully diverted any waters from said Lodge Grass Creek, or that he has wrongfully or unlawfully used any of said waters from said creek upon the lands above described; admit that he has diverted waters from said Lodge Grass Creek sufficient for the proper irrigation of 143.7 acres of

said lands, but allege that such diversion was lawful and [39] under valid appropriations of water from said creek for the irrigation of said 143.7 acres of land, and admit that no part of his said lands lies under any one of the ditches described in the bill of complaint herein.

22. Deny that these answering defendants, named in paragraphs 16-17-18-19-20 and 21 of this answer, or either of them, have ever diverted or used any of the waters of said Little Big Horn River or Lodge Grass Creek or their tributaries to which they were not lawfully entitled; deny that they have ever wrongfully or unlawfully diverted any waters from said river, creek, or their tributaries; deny that their diversions of water from said Little Big Horn River or from said Lodge Grass Creek were without the consent of plaintiff, or of its officers, or agents, or of the superintendent of the Crow Indian Reservation, or of the Crow tribe of Indians, or of any one else who could lawfully give such consent; deny that they have obstructed the free or uninterrupted flow of waters in said river, creek or their tributaries, by building dams therein, or otherwise, except as to the diversions of water from the Little Big Horn River and from Lodge Grass Creek for the irrigation of approximately 1174.6 acres of land, the aggregate of the irrigated acreages mentioned in paragraphs 16-17-18-19-20 and 21 hereinabove, to which said water they are lawfully entitled; admit that, if they have not taken such water from said Little Big Horn River and Lodge Grass Creek by means of dams, headgates

and ditches, said water would flow down said river and creek and into and through one or more of the irrigation ditches constructed by plaintiff on said reservation and upon land susceptible of cultivation lying under one or more of said ditches; deny that said waters were or are necessary [40] for the cultivation of such last mentioned land or the growing of crops thereon; admit that they continue to take water from said river and said creek for the irrigation of their said aggregate of 1174.6 acres of land, and they will continue to do so, but deny that they have, or now are, obstructing the free flow of the water in said river, creek, or the tributaries to which plaintiff, said Crow tribe of Indians or any Crow Indian is entitled.

23. Deny that they have been guilty of any wrongful or unlawful diversions of any of said waters; deny that plaintiff, or its Indian wards, or any of them, or any allottee of lands on said reservation lying under any one of the irrigation ditches described in said bill of complaint, has suffered any injury, loss or damage by reason of the diversions of any of said waters by these answering defendants from said river, creek or their tributaries; deny that any such injury, loss or damage will be suffered by them, or any of them, by reason of water which these answering defendants will divert from said river, creek or their tributaries; deny that the crops, growing upon the lands of the Indian wards of plaintiff at the time the bill of complaint herein was filed, were being damaged or destroyed by reason of any water taken by these

defendants from said river, creek or their tributaries; deny that these defendants, or either of them, have ever interfered with any irrigation project or ditch built or constructed by plaintiff on said Crow Indian reservation, or that plaintiff, or any one of its Indian wards will suffer any loss or damage because of any interference by these defendants, or either of them, with any of said irrigation ditches, or with any irrigation project mentioned, or described in, said bill of complaint; deny that [41] plaintiff, or its Indian wards, or any of them, has suffered, or will suffer, any loss or damage by reason of any water taken by these defendants, or either of them from said river, creek or their tributaries, and deny that these defendants, or either of them, have ever taken any water from said river, or creek, or their tributaries, to which plaintiff, or its Indian wards, or any one of them, is lawfully entitled.

24. Deny that plaintiff has no plain, speedy, adequate, or complete remedy at law, or otherwise, for the matters complained of in said bill of complaint, and deny that plaintiff has no remedy except in a court of equity for the matters complained of in said bill of complaint.

For further answer and affirmative defense to the bill of complaint herein, these answering defendants say:

I.

1. That in the year 1905 Heifer Woman allottee #1708, Yellow Coyote allottee #1705, Young Duck

allottee #1707, Mad Bear Wolf allottee #1704, Little Face allottee #1349, Deaf allottee #1350, Medicine Horse allottee #1351, The Wolf allottee #328, Gives Away allottee #1686 were members of the Crow tribe of Indians and were residing on the Crow Indian Reservation in the State of Montana.

2. That some time prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, the following described tracts of land, to-wit:

To Heifer Woman #1708—

Northwest quarter of the southeast quarter and the southeast quarter of the northeast quarter of section nine, in township nine south of range thirty-four east of the Montana Meridian in Montana; [42]

To Yellow Coyote #1705—

East one-half of the southeast quarter of section nine, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Young Duck #1707—

Northeast of the northeast of section sixteen, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Mad Bear Wolf #1704—

Southwest quarter of the northwest quarter and the northwest quarter of the southwest

quarter of section ten, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Little Face #1349—

East one-half of the northwest quarter of section ten and the southeast quarter of the southeast quarter of section three, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Deaf #1350—

Southwest quarter of the southwest quarter of section ten, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Medicine Horse #1351—

Northeast quarter of the southwest quarter of section ten, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To The Wolf #328—

Northeast of the northeast of section ten, in township nine south of range thirty-four east of the Montana Meridian in Montana;

To Gives Away #1686—

Southwest of the Northwest of section eleven, in township nine south of range thirty-four east of the Montana Meridian in Montana.

3. That a portion of the lands allotted to the above named members of the Crow tribe of In-

dians were irrigable lands, capable of being irrigated from the waters of the Little Big Horn River and its tributaries, and were located under a ditch proposed and surveyed by the United States Indian Irrigation Service [43] and designated by such service as Upper Little Horn Ditch #1.

4. That when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth herein before, the use of the waters of the streams of the Crow Indian reservation, i. e., the waters of Little Big Horn River and its tributaries, were reserved to each individual Indian named in paragraph 1, of this affirmative defense in such amount as is, or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the lands so allotted to each said Indian.

5. That in the year 1920 Joseph Garrett Stewart, allottee #3552, Henry Keiser, allottee #3513 and Juanita Keiser No. 2, allottee #3314 were members of the Crow tribe of Indians, residing on the Crow Indian reservation in the state of Montana.

6. That some time prior to the year 1921 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to the last above named Crow Indians, and as their individual

property the following described tracts of land, to-wit:

To Joseph Garrett Stewart #3552—

Northwest quarter of the northeast quarter of section eleven, in township nine south of range thirty-four east of the Montana Principal Meridian in Montana;

To Henry Keiser #3513—

Southeast quarter of the southeast quarter of section thirty-five, in township eight south of range thirty-four east of the Montana Meridian in Montana. [44]

To Juanita Keiser No. 2 #3314—

Northeast quarter of the northeast quarter of section two, in township nine south of range thirty-four east of the Montana Meridian in Montana.

7. That a portion of the lands allotted to the above named members of the Crow tribe of Indians were irrigable lands, capable of being irrigated from the waters of the Little Big Horn River and its tributaries, and were located under a ditch proposed and surveyed by the United States Indian Irrigation Service and designated by such service as Upper Little Horn Ditch #1.

8. That when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth hereinbefore, the use of the waters of the streams of the Crow Indian reservation, i.e., the waters of Little Big Horn River and its tributaries,

were reserved to each individual Indian named in paragraph 5 of this affirmative defense in such amount as is, or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the lands so allotted to each said Indian.

9. That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth; and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraphs 1 and 5 of this affirmative defense, died, and those [45] portions, or parts, of their allotments described in paragraphs 2 and 6 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales, and at such sales the predecessors in interest of defendant, Antler Land Company, purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That thereafter the plaintiff issued and delivered to the predecessors in interest of Antler Land Company patents in fee, conveying each of the tracts of land so sold.

10. That immediately after the issuance and delivery of the patents to the land so purchased, as hereinbefore set forth, the purchasers of said lands, predecessors in interest of Antler Land Company, proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation. That at this time all of the lands described in paragraphs 2 and 6 of this affirmative defense were within the boundaries of the Upper Little Horn Ditch #1, which ditch was proposed and surveyed by the United States Indian Irrigation Service. That the predecessors in interest of defendant, Antler Land Company, who were then the owners of the said lands were advised by plaintiff that all of the said lands, which were capable of being irrigated and which now lie under this defendant's ditch, were within the area to be irrigated by the United States Indian Irrigation Service Ditch, which they designated as Upper Little Horn Ditch #1; that they, the said predecessors in interest of Antler Land Company, should not and must not attempt any irrigation of the said lands because plaintiff, through its agency, the United States Indian Irrigation Service, had surveyed and intended to construct Upper Little Horn Ditch #1, which would irrigate all of the lands described in paragraphs 2 and 5 of this affirmative defense which were irrigable. That [46] relying upon such statements and promises of plaintiff the predecessors in interest of Antler Land Company did not start the immediate construction of any ditches to convey water from the Little Big Horn River to the said

lands for irrigation purposes, but they did proceed with reasonable diligence to place the said lands under irrigation by having surveys made, and took other steps necessary and incident to placing the said lands under irrigation.

11. That on or about August 31, 1915 the predecessor in interest of Antler Land Company constructed an irrigation ditch tapping the Little Big Horn River on the northerly bank thereof at a point north 10° 0′ east 422 feet from the southwest corner of section 17, township 9, south of range 34 east, and running thence in a northeasterly direction to a point about 450 feet north of the northeast corner of the SE¼NE¼ Sec. 36, Twp. 8 S. Rge 35#., through which he, and it, conveyed water from said Little Big Horn River to, over and upon approximately 537.4 acres of land situated in and being a part of said lands allotted to the various Indians as set forth in paragraphs 2 and 6 of this affirmative defense as follows:

Heifer Woman	#1708	45.6 acres
Yellow Coyote	#1705	77.2 acres
Mad Bear Wolf	#1704	69.0 acres
Deaf	#1350	39.0 acres
Little Face	#1349	74.5 acres
Medicine Horse	#1351	40.0 acres
The Wolf	# 328	48.1 acres
Gives Away	#1686	30.8 acres
Young Duck	#1707	22.0 acres
Joseph Garret Stewart	#3552	20.0 acres
Henry Keiser	#3513	31.2 acres
Juanita Keiser No. 2	#3314	40.0 acres

and ever since then they, and the defendant Antler Land Company, have conveyed water from said Little Big Horn River through the [47] ditch, and ditches, so constructed to and upon said lands and have continuously irrigated said lands with the water so conveyed through said ditch, and ditches.

12. That said lands so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre delivered upon said irrigated land for the proper irrigation thereof; that said ditch is approximately two miles in length before it reaches the land of Antler Land Company, and that in conveying the necessary water for the irrigation of said tracts of land from Little Big Horn River to said irrigated tracts of land, there is a loss of water from seepage and evaporation of approximately thirty miner's inches of water, because of which fact Antler Land Company needs and requires and is entitled to an appropriation of 298.7 miner's inches of water at the point where said water is diverted from Little Big Horn River, for the proper irrigation of the said 537.4 acres of irrigated land.

13. That by the construction of the ditch described hereinbefore, by the diligence and efforts of the predecessors in interest of Antler Land Company to place said lands under irrigation, and by the diversion of water from said Little Big Horn River by the predecessors in interest of Antler Land Company and by the use of the waters so diverted in the irrigation of the various tracts of land herein described by this answering defendant, and its prede-

cessors in interest, the predecessors in interest of Antler Land Company and this defendant appropriated and used 298.7 inches of water of said Little Big Horn River; that ever since the first use of said water this defendant and its predecessors in interest, have continually diverted and used that amount of water from said Little Big Horn River for the irrigation of said lands [48] of this defendant, and that by said diversion and use, and because of the purchase of all rights of the Indian allottees to the use of said waters, this defendant acquired a vested water right in said Little Big Horn River for 298.7 inches of water as of the date May 7, 1868.

14. That by mesne conveyances from said original patentees, the Antler Land Company is the owner of the legal title to all of the land described in paragraphs 2 and 6 of this affirmative defense, together with the tenements, hereditaments and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinabove set forth.

II.

15. That in the year 1905 Buffalo That Sings #1702, Meat #1700, Ella Meat #1703, The Back #1701 were members of the Crow tribe of Indians and were residing on the Crow Indian Reservation in the state of Montana.

16. That sometime prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, the fol-

To Meat #1700

Northeast quarter of southwest quarter, southwest quarter of southeast quarter of section nine, northwest quarter of northeast quarter of section sixteen, township nine south of range thirty-four east of the Montana Meridian in Montana.

Buffalo That Sings #1702

Southwest quarter of southwest quarter of section nine, township nine south of range thirty-four east of the Montana Meridian in Montana.

The Back #1701

Northeast quarter of northwest quarter of section sixteen, township nine south of range thirty-four east of the Montana Meridian in Montana. [49]

Ella Meat #1703

Southeast quarter of southwest quarter of section nine, township nine south of range thirty-four east of the Montana Meridian in Montana.

17. That a portion of the lands allotted to the bove named members of the Crow Tribe of Indians were irrigable lands, capable of being irrigated from the waters of the Little Big Horn iver and its tributaries, and were located under a tch proposed and surveyed by the United States ndian Irrigation Service and designated by such rvice as Upper Little Horn Ditch #1.

18. That when the said lands were so allotted to id members of the Crow tribe of Indians, as set

forth hereinbefore, the use of the waters of the streams of the Crow Indian reservation, i. e., the waters of Little Big Horn River and its tributaries, were reserved to each individual Indian named in paragraph 16 of this affirmative defense in such amount as is or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the lands so allotted to each said Indian.

19. That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraph 16 of this affirmative defense, died, and those portions, or parts, of their allotments described [50] in paragraph 16 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales, and at such sales the predecessors in interest of one Mrs. Barney Ladow purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That thereafter the plaintiff issued and delivered to the predecessors in interest of Mrs. Barney Ladow patents in fee, conveying each of the tracts of land so sold.

20. That immediately after the issuance and delivery of the patents to the land so purchased, as hereinbefore set forth, the purchasers of said lands, predecessors in interest of Mrs. Barney Ladow, proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation. That at this time all of the lands described in paragraph 16 of this affimative defense lie under the Upper Little Horn Ditch #1, which ditch was proposed and surveyed by the United States Indian Irrigation Service. That the predecessors in interest of Mrs. Barney Ladow who were then the owners of the said lands were advised by plaintiff that all of the said lands, which were capable of being irrigated and which now lie under this defendant's ditch, were within the area to be irrigated by the United States Indian Irrigation Service Ditch, which they designated as Upper Little Horn Ditch #1; that they, the said predecessors in interest of Mrs. Barney Ladow, should not and must not attempt any irrigation of the said lands because plaintiff, through its agency, the United States Indian Irrigation Service, has surveyed and intended to construct Upper Little Horn Ditch #1, which would irrigate all of the lands described in paragraph 16 of this affirmative defense which were irrigable. That relying upon such statements and promises of plaintiff the predecessors in interest of Mrs. [51] Barney Ladow did not start the immediate construction of any ditches to convey water from the Little Big Horn River to the said lands

for irrigation purposes, but they did proceed with reasonable diligence to place the said lands under irrigation by having surveys made, and took other steps necessary and incident to placing the said lands under irrigation.

21. That, on or about August 31, 1915, the predecessors in interest of Mrs. Barney Ladow constructed an irrigation ditch tapping the Little Big Horn River, on the northerly bank thereof, at a point north 10° 0′ east 422 feet from the southwest corner of section 17, township 9, south of range 34 east, and running thence in a northeasterly direction to a point about the middle of section 9, township nine south of range thirty-five east. That through this ditch the predecessor in interest and the present owner and her agents conveyed water from said Little Big Horn River to, over and upon approximately 158.6 acres of land situated in and being a part of said lands allotted to the various Indians as set forth in paragraph 16 of this affirmative defense as follows:

Heat	#1700	74.0 acres
Buffalo that Sings	#1702	36.6 acres
The Back	#1701	8.0 acres
Ella Heat	#1703	40.0 acres

and ever since then they have conveyed water from said Little Big Horn River through the ditch so constructed to and upon said lands and have continuously irrigated said lands with the water so conveyed through said ditch.

22. That said lands, so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre, delivered upon said irrigated land, for the proper irrigation thereof; that said ditch is approximately one mile in length before it reaches the land of Mrs. Barney Ladow, and that in conveying the necessary water for the irrigation of said tracts [52] of land, there is a loss of water from seepage and evaporation of approximately five miner's inches of water, because of which fact Mrs. Barney Ladow needs and requires and is entitled to an appropriation of 84.3 miner's inches of water at the point where said water is diverted from Little Big Horn River, for the proper irrigation of the said 158.6 acres of irrigated land.

23. That by the construction of the ditch described hereinbefore, by the dilligence and efforts of the predecessor in interest of Mrs. Barney Ladow to place said lands under irrigation, and by the diversion of water from said Little Big Horn River by the said predecessor in interest and by the use of the water so diverted in the irrigation of the various tracts of land, as hereinbefore described, said predecessor in interest appropriated and used 84.3 miner's inches of water of said Little Big Horn River; that ever since the first use of said water the said predecessor in interest, Mrs. Barney Ladow, her lessees and agents have continuously diverted and used that amount of water from said Little Big Horn River for the irrigation of said land, and that by said diversion and use, and because of the

purchase of all rights of the Indian allottees to the use of said water, Mrs. Barney Ladow acquired a vested water right in said Little Big Horn River for 84.3 inches of water as of date May 7, 1868.

24. That by mesne conveyances from said original patentees, Mrs. Barney Ladow is the owner of the legal title to all of the land described in paragraph 16 of this affirmative defense, together with the tenements, hereditaments, and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinbefore set forth, and the defendant Antler Land Company [53] is the lessee, under lease from Mrs. Barney Ladow, of the said premises and is entitled to the enjoyment and control of the same, including the use of the said 84.3 inches of water from the Little Big Horn River.

III.

25. That in the year 1905 Wrinkle Face allottee #1722 and Medicine Coyote, allottee #1287 were members of the Crow tribe of Indians and were residing on the Crow Indian Reservation in the state of Montana.

26. That sometime prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, the following described tracts of land, to-wit:

To Wrinkle Face #1722

South half of the southwest quarter of section twenty-eight, township eight south of range

thirty-five east of the Montana Meridian in Montana.

To Medicine Coyote #1287

Northeast quarter of the southwest quarter of section twenty-eight, township eight south of range thirty-five east, of the Montana Meridian in Montana.

27. That a portion of the lands allotted to the above named members of the Crow tribe of Indians were irrigable lands, capable of being irrigated from the waters of the Little Big Horn River and its tributaries, and were located under a ditch proposed and surveyed by the United States Indian Irrigation Service and designated by such service as Upper Little Horn Ditch #3.

28. That when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth herein- [54] before, the use of the waters of the streams of the Crow Indian reservation, i. e., the waters of Little Big Horn River and its tributaries, were reserved to each individual Indian named in paragraph 26 of this affirmative defense in such amount as is, or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the lands so allotted to each said Indian.

29. That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraph 26 of this affirmative defense, died, and those portions, or parts, of their allotments described in paragraph 26 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales, and at such sales the predecessors in interest of one Mabel Pace purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That thereafter the plaintiff issued and delivered to the predecessors in interest of Mabel Pace patents in fee, conveying each of the tracts of land so sold.

30. That immediately after the issuance and delivery of the patents to the land so purchased, as hereinbefore set forth, the purchasers of said lands, predecessors in interest of Mabel Pace, proceeded with reasonable diligence to place all of the [55] irrigable lands, so purchased, under irrigation. That at this time all of the lands described in paragraph 26 of this affirmative defense lie under the Upper Little Horn Ditch #3, which ditch was proposed and surveyed by the United States Indian Irrigation Service. That the predecessors in interest of Mabel Pace who were then the owners of the said lands were advised by plaintiff that all of the said lands, which were capable of being irrigated and

which now lie under this defendants' ditch, were within the area to be irrigated by the United States Indian Irrigation Service Ditch, which they designated as Upper Little Horn Ditch #3; that they, the said predecessors in interest of Mabel Pace, should not and must not attempt any irrigation of the said lands because plaintiff, through its agency, the United States Indian Irrigation Service, has surveyed and intended to construct Upper Little Horn Ditch #3, which would irrigate all of the lands described in paragraph 26 of this affirmative defense which were irrigable. That relying upon such statements and promises of plaintiff the predecessors in interest of Mabel Pace did not start the immediate construction of any ditches to convey water from the Little Big Horn River to the said lands for irrigation purposes, but they did proceed with reasonable diligence to place the said lands under irrigation by having surveys made, and took other steps necessary and incident to placing the said lands under irrigation.

31. That on or about October 13, 1917 the predecessor in interest of Mabel Pace constructed an irrigation ditch tapping the Little Big Horn River at a point upon its south bank 30° 13' west 1228 feet from the northeast corner of section 32, township 8 south of range 35 E., and extending in a northeasterly direction to the northeast corner of the [56] SW¼ of section 28, township 8 south of range 35E, through which ditch the predecessor in interest and the present owner, and her agents, have conveyed water from said Little Big Horn River to,

over and upon approximately 73.6 acres of land, situated in and being a part of said lands allotted to the various Indians set forth in paragraph 26 of this affirmative defense as follows:

Wrinkle Face	#1722	58.5 acres
Medicine Coyote	#1287	15.1 acres

and ever since then they, the predecessors in interest, and the present owner, have conveyed water from said Little Big Horn River, through the said ditch, so constructed, to and upon said lands and have continuously irrigated said lands with the water, so conveyed through said ditch.

32. That said lands so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre, delivered upon said irrigated land, for the proper irrigation thereof; that said ditch is approximately one-half mile in length, before it reaches the land of Mabel Pace, and that in conveying the necessary water for the irrigation of said tracts of land, there is a loss of water from seepage and evaporation of approximately one miner's inch of water. That, therefore, Mabel Pace needs and requires and is entitled to an appropriation of 38 miner's inches of water at the point where said water is diverted from Little Big Horn River, for th proper irrigation of the said 73.6 acres of irrigated land.

33. That, by the construction of the ditch described hereinbefore, by the diligence and efforts of the predecessors in interest of Mabel Pace to place said lands under irrigation, by the diversion

of water from said Little Big Horn River by the said predecessor in interest and by the use [57] of the water so diverted in the irrigation of the various tracts of land, as hereinbefore described, said predecessor in interest appropriated and used 38 miner's inches of water of said Little Big Horn River; that ever since the first use of said water the said predecessor in interest, Mabel Pace, her lessees and agents have continuously diverted and used that amount of water from said Little Big Horn River for the irrigation of said land, and that by said diversion and use, and because of the purchase of all rights of the Indian allottees to the use of said water, Mabel Pace acquired a vested water right in the said Little Big Horn River for 38 inches of water as of date May 7, 1868.

34. That by mesne conveyances from said original patentees, Mabel Pace is the owner of the legal title to all of the land described in paragraph 26 of this affirmative defense, together with the tenements, hereditaments and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinbefore set forth, and the defendant H. G. Campbell is the lessee, under lease from Mabel Pace, of the said premises and is entitled to the enjoyment and control of the same, including the use of the said 38 inches of water from the Little Big Horn River.

IV.

35. That in the year 1905 Crazyhead, allottee #1642 and Paintspretty, allottee #1643 were mem-

bers of the Crow tribe of Indians and were residing on the Crow Indian Reservation in the State of Montana.

36. That some time prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, [58] duly and regularly allotted to said Crow Indians, and as their individual property, the following described tracts of land, to-wit:

To Crazyhead #1642

south half of the northeast quarter of section twenty-eight, township eight south of range thirty-five east of the Montana Meridian in Montana.

To Paintpretty #1643

Southeast quarter of the northwest quarter of section twenty-eight, township eight south of range thirty-five east of the Montana Meridian in Montana.

37. That a portion of the lands allotted to the above named members of the Crow tribe of Indians were irrigable lands, capable of being irrigated from the waters of the Little Big Horn River and its tributaries, and were located under a ditch proposed and surveyed by the United States Indian Irrigation Service and designated by such service as Upper Little Horn Ditch #3.

38. That when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth hereinbefore, the use of the waters of the streams of the Crow Indian reservation, i. e., the waters of the Little Big Horn River and its tribu-

taries, were reserved to each individual Indian named in paragraph 36 of this affirmative defense in such amounts as is, or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the lands so allotted to each said Indian. [59]

39. That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraph 36 of this affirmative defense, died, and those portions, or parts of their allotments described in paragraph 36 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales, and at such sales the predecessors in interest, of one Edith G. Belken and Judy Walsh purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That thereafter the plaintiff issued and delivered to the predecessors in interest of Edith G. Belken and Judy Walsh patents, in fee, conveying each of the tracts of land so sold.

40. That immediately after the issuance and delivery of the patents to the land so purchased, as

hereinbefore set forth, the purchasers of said lands, predecessors in interest of Edith G. Belken and Judy Walsh, proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation. That at this time all of the lands described in paragraph 36 of this affirmative defense lie under the Upper Little Horn Ditch #3, which ditch was proposed and surveyed by the United States Indian Irrigation Service. That the predecessors in interest of Edith G. Belken and Judy Walsh who were then the owners of the said lands were advised by plaintiff that all of the said lands, which were capable of being irrigated and which now lie under this defendant's ditch, were within the area to be irrigated by the United States Indian Irrigation Service Ditch [60] which they designated as Upper Little Horn Ditch #3, that they, the said predecessors in interest of Edith G. Belken and Judy Walsh, should not and must not attempt any irrigation of the said lands because plaintiff, through its agency, the United States Indian Irrigation Service, has surveyed and intended to construct Upper Little Horn Ditch #3, which would irrigate all of the lands described in paragraph 36 of this affirmative defense which were irrigable. That relying upon such statements and promises of plaintiff the predecessors in interest of Edith G. Belken and Judy Walsh did not start the immediate construction of any ditches to convey water from the Little Big Horn River to the said lands for irrigation purposes, but they did proceed with reasonable diligence to place the said lands

nder irrigation by having surveys made, and took ther steps necessary and incident to placing the aid lands under irrigation.

41. That on or about October 13, 1917 the redecessors in interest of Edith G. Belken and udy Walsh constructed an irrigation ditch ing the Little Big Horn River at a point on its outh bank 34°13′ west 1226 feet from the northeast orner of section 32, township 8 south of range 35 E, nd extending in a northeasterly direction to the orth line of the southwest quarter of the northeast uarter of section 28, township 8 south of range irty-five east, through which ditch the predeeessor interest and the present owner and her agents, ave conveyed water from said Little Big Horn iver to, over and upon approximately 80.3 acres f land situated in and being a part of said lands llotted to the various Indians set forth in paraaph 36 of this affirmative defense as follows:

Crazyhead	#1642	77.1 acres
Paintpretty	#1643	3.2 acres

[61]

nd ever since then they, the predecessors in inrest, and the present owner, have conveyed water om said Little Big Horn River through the said tch, so constructed to and upon said lands and ave continuously irrigated said lands with the ater so conveyed through said ditch.

42. That said lands so irrigated, and all thereof, eed and require one-half of one miner's inch water per acre delivered upon said irrigated

land for the proper irrigation thereof; that said ditch is approximately one mile in length before it reaches the land of Edith G. Belken and Judy Walsh and that in conveying the necessary water for the irrigation of said tracts of land, there is a loss of water from seepage and evaporation of approximately five miner's inches of water, because of which fact Edith G. Belken and Judy Walsh need and require and are entitled to an appropriation of 42 miner's inches of water at the point where said water is diverted from Little Big Horn River, for the proper irrigation of the said 80.3 acres of irrigated land.

43. That by the construction of the ditch described hereinbefore, by the diligence and efforts of the predecessors in interest of Edith G. Belken and Judy Walsh to place said lands under irrigation, and by the diversion of water from said Little Big Horn River by the said predecessor in interest and by the use of the water so diverted in the irrigation of the various tracts of land, as hereinbefore described, said predecessor in interest appropriated and used 42 miner's inches of water of the said Little Big Horn River; that ever since the first use of said water the said predecessor in interest, Edith G. Belken and Judy Walsh, their lessees and agents have continuously diverted and used that amount of water from said [62] Little Big Horn River for the irrigation of said land, and that by said diversion and use, and because of the purchase of all rights of the Indian allottees to the use of said water, Edith G. Belken and Judy Walsh ac-

quired a vested water right in said Little Big Horn River for 42 inches of water as of date May 7, 1868.

44. That by mesne conveyances from said original patentees, Edith G. Belken and Judy Walsh are the owners of the legal title to all of the land described in paragraph 36 of this affirmative defense, together with the tenements, hereditaments and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinbefore set forth.

V.

45. That in the year 1905 Doesanything, allottee #1396 was a member of the Crow tribe of Indians and was residing on the Crow Indian Reservation in the State of Montana.

46. That sometime prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, the following described tract of land, to-wit:

To Doesanything #1396

Northeast quarter and the southeast quarter of the northwest quarter of section twenty-nine; south half of the southwest quarter of section twenty, township seven south of range thirty-four east of the Montana Meridian in Montana.

47. That when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth hereinbefore, the use of the waters of the streams of the Crow Indian reservation, i. e., the waters of Lodge Grass Creek and [63] its tribu-

taries, were reserved to each individual Indian named in paragraph 46 of this affirmative defense in such amounts as is, or might be, needed for the beneficial use of each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and any other beneficial purposes. That thereupon each of said Indians allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters, thereby became appurtenant to the lands so allotted to each said Indian.

48. That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees described in paragraph 46 of this affirmative defense, died, and those portions, or parts, of their allotments described in paragraph 46 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales, and at such sales the predecessor in interest of one Billie Miller purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That thereafter the plaintiff issued and delivered to the predecessors in interest of Billie Miller patents in fee, conveying each of the tracts of land so sold.

49. That immediately after the issuance and delivery of the patents to the land so purchased, as hereinbefore set forth, the purchasers of said lands,

predecessors in interest of Billie Miller, proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation.

50. That immediately after the defendant, Billie [64] Miller, secured title to the said premises, through the said sale by plaintiff, he proceeded, with reasonable diligence, to place the lands under irrigation and irrigated the same, and he did, then, construct an irrigation ditch tapping Lodge Grass Creek, at a point, almost directly south of the center of the southwest quarter of the southwest quarter of section 29, township 7, south of range 34 east, and thence, northeasterly, to the northeast corner of the southeast quarter of the southeast quarter of section 20, township 7, south of range 34 east, through which ditch he conveyed water, from said Lodge Grass Creek, to, and upon, approximately 111.6 acres of the land of Doesanything, allottee #1396. That, ever since then, he has conveyed water, from said Lodge Grass Creek, through the said ditch, so constructed, to, and upon said lands and has continuously irrigated said lands with the water so conveyed through said ditch.

51. That said lands, so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre, delivered upon said irrigated land, for the proper irrigation thereof; that said ditch is approximately one-half mile in length before it reaches the land of Billie Miller. That, in conveying the necessary water, for the irrigation of said tracts of land, from Lodge Grass Creek, to said

irrigated tracts of land, there is a loss of approximately one miner's inch of water caused by seepage and evaporation. That, therefore, Billie Miller needs, requires and is entitled to, an appropriation of 57 miner's inches of water, at the point where said water is diverted from Lodge Grass Creek, for the proper irrigation of the said 111.6 acres of irrigated land.

52. That, by the construction of the ditch described hereinbefore, by his diligence and efforts to place said lands [65] under irrigation and by the diversion of waters from said Lodge Grass Creek, the defendant, Billie Miller, appropriated and used 57 miner's inches of water of said Lodge Grass Creek; that ever since the first use of said water the said Billie Miller has continuously diverted and used that amount of water from said Lodge Grass Creek for the irrigation of said lands, and that by said diversion and use, and because of the purchase of all of the rights of the Indian allottee to the use of said water, Billie Miller acquired a vested water right in said Lodge Grass Creek for 57 miner's inches of water as of date of May 7, 1868.

53. That, the defendant, Billie Miller, is the owner of the legal title to all of the lands described in paragraph 46 of this affirmative defense, together with the tenements, hereditaments and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinabove set forth.

VI.

54. That in the year 1905 Pounded Meat, allottee #1891, Strikes Feather, allottee #1392, Holds A Feather, allottee #387, Plain To See, allottee #493, Eagle, allottee #1388, were members of the Crow tribe of Indians and were residing on the Crow Indian reservation in the State of Montana.

55. That sometime prior to the year 1905 the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, the following described tracts of land, to-wit:

To Pounded Meat, #1391—

South half of the northwest quarter of section twenty-one, township seven south of range thirty-four east of the Montana Meridian in Montant. [66]

To Strikes Feather #1392—

Northwest quarter of the southwest quarter of section twenty-one, township seven south of range thirty-four east of the Montana Meridian in Montana;

To Holds A Feather #387—

East half of the southwest quarter of section twenty-one, township seven south of range thirty-four east of the Montana Meridian in Montana;

To Plain To See #493—

Northwest quarter of the southeast quarter of section twenty-one, township seven south of

range thirty-four east of the Montana Meridian in Montana;

To Eagle #1388—

Southwest quarter of the southwest quarter of section twenty-one, township seven south of range thirty-four east of the Montana Meridian in Montana.

56. That, when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth hereinbefore, the use of the water of the streams of the Crow Indian reservation, i. e., the waters of Lodge Grass Creek and its tributaries, was reserved, to each individual Indian named in paragraph 55 of this affirmative defense, in such amount as is, or might be, needed, for the beneficial use, of each of the said Indians, in irrigating the said lands so allotted to each of them, and for stock, domestic use and any other beneficial purposes. That thereupon each, of said Indian allottees, was vested with the rights incident to ownership of both the land and said waters. That the right, to said waters, thereby, became appurtenant to the lands so allotted to each said Indian.

57. That, after the lands described above were allotted to the Indians named, after the reserved waters became vested in each of said Indians, as hereinbefore set forth, [67] and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraph 55 of this affirmative

defense, died, and those portions, or parts, of their allotments described in paragraph 55 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales. That at such sales, the predecessors in interest of defendant, Robert J. Miller and Robert J. Miller purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That, thereafter, the plaintiff issued and delivered to the predecessors in interest of Robert J. Miller and to Robert J. Miller patents, in fee, conveying each of the tracts of land so sold, and, thereby, conveyed to them said lands, together with all the rights, privileges, immunities and appurtenances, thereunto belonging, including the right to the use of water for irrigation which had theretofore belonged to the Indian.

58. That, immediately, after the issuance and delivery of the patents, to the land so purchased, as hereinbefore set forth the purchases of said lands, predecessors in interest of Robert J. Miller, and Robert J. Miller proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation.

59. That, immediately, after securing title to the said premises, the predecessors in interest of defendant, Robert J. Miller, constructed an irrigation ditch, tapping Lodge Grass Creek, on the northerly bank thereof at a point about 1000 feet due south of the common corner of sections 20-21-28 and 29, in a northeasterly direction, to a point about 1000 feet

south of the northeast corner of the northeast quarter of the northwest quarter of section 21, township 7, south of range 34 east. That through [68] this ditch the predecessors in interest, of defendant, Robert J. Miller, conveyed water from said Lodge Grass Creek, to, over and upon approximately 143.7 acres of land situated in and being a part of said lands allotted to the various Indians as set forth in paragraph 55 of this affirmative defense, as follows:

Pounded Meat	#1391	36.8 acres
Strikes Feathers	#1392	25.6 acres
Holds A Feather	# 387	40.3 acres
Eagle	#1388	25.5 acres
Plain to See	# 493	7.0 acres

and ever since then the said Robert J. Miller, and his predecessors, have conveyed water, from said Lodge Grass Creek, through the said ditch, so constructed, to and upon said lands and have continuously irrigated said lands with the water so conveyed through said ditch.

60. That said lands, so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre, delivered upon said irrigated land, for the proper irrigation thereof; that said ditch is approximately one-eighth mile in length before it reaches the land of defendant, Robert J. Miller. That in conveying the necessary water for the irrigation of said tracts of land, from Lodge Grass Creek, to said irrigated tracts of land, there is a loss of water from seepage and evaporation of ap-

proximately five miner's inches of water. That, therefore, Robert J. Miller needs, requires and is entitled to, an appropriation of 77 miner's inches of water, at the point where said water is diverted, from Lodge Grass Creek, for the proper irrigation of said 143.7 acres of irrigated land.

61. That, by the construction of the ditch as described hereinbefore, by the diligence and efforts of Robert J. Miller to place said lands under irrigation, by the diversion of water from said Lodge Grass Creek, and by the use of the water so diverted, in the irrigation of the various tracts of land hereinbefore [69] described, this defendant appropriated and used 77 inches of water of said Lodge Grass Creek. That, ever since the first use of said water, this defendant has continuously diverted and used, that amount of water, from said Lodge Grass Creek, for the irrigation of defendant's said lands. That, by said diversion and use, and because of the purchase of all rights of the Indian allottees to the use of said waters, this defendant acquired a vested water right, in said Lodge Grass Creek, for 77 inches of water, as of the date, May 7, 1868.

62. That, by mesne conveyances, from said original patentees, and, in the case of allotments of Eagle #1388 and Plain to See #493, by fee-patents from the United States of America to said Robert J. Miller, the said Robert J. Miller is the owner of the legal title to all of the land described in paragraph 55 of this affirmative defense, together with

the tenements, hereditaments and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinbefore set forth.

VII.

63. That, in the year 1905, Prettyshield, allottee #1167, Crazy Sisterinlaw, allottee #1175, Goesahead, allottee #1166, were members of the Crow tribe of Indians and were residing on the Crow Indian reservation in the State of Montana.

64. That, sometime prior to the year 1905, the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, as their individual property, the following described tracts of land, to-wit:

To Prettyshield #1167—

Southeast of the southeast of section four, in township five south of range thirty-five east of the Montana Meridian in Montana;

To Crazy Sisterinlaw #1175

Lot six and the northeast quarter of the southeast quarter of section four, in township five south of range thirty-five east of the Montana Meridian in Montana; [70]

To Goesahead #1166—

Southeast quarter of the northeast quarter of section four in township five south of range thirty-five east of the Montana Meridian in Montana.

65. That, when the said lands were so allotted to said members of the Crow tribe of Indians, as set forth hereinbefore, the use of the waters, of the streams, of the Crow Indian reservation, i. e., the waters of Little Big Horn River and its tributaries, was reserved, to each individual Indian named in paragraph 64 of this affirmative defense in such amount as is, or might be, needed for the beneficial use of each of the said Indians, in irrigating the said lands so allotted to each of them, and for stock, domestic and any other such beneficial use or purposes. That, thereupon, each of said Indian allottees was vested with the rights, incident to ownership of both the lands and said waters, which right, to said waters, thereby became appurtenant to the lands so allotted to, each, said Indian.

66. That, after the lands described above were allotted to the Indians named, after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said water became appurtenant to each specific tract of land, as described hereinbefore, each of said Indian allottees, described in paragraph 64 of this affirmative defense, died, and those portions, or parts, of their allotments, described in paragraph 64 of this affirmative defense, were sold, by the plaintiff, as guardian of Indian wards, at public sales. That, at such sales, the predecessors in interest of defendants, Jay L. Henman and Ruth Henman, purchased the said lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging. That, there-

after, the plaintiff issued and delivered to the predecessors in interest of Jay L. Henman and Ruth Henman, patents in fee, conveying each of the tracts of land so sold.

That the southeast quarter of the southeast quarter of section 4, in township 5 south of range 35 east, is the allotment of Pretty Shield, #1167. That Pretty Shield, prior to her death, executed and delivered to F. M. Heinrich, the predecessor in interest of these defendants, a non-competent Indian land deed, which was approved by the Secretary of the Interior pursuant to the statutes in force and effect at that time. [71]

67. That immediately after the issuance and delivery of the patents to the land so purchased, as hereinbefore set forth, the purchasers of said lands, predecessors in interest of Jay L. Henman and Ruth Henman, proceeded with reasonable diligence to place all of the irrigable lands, so purchased, under irrigation.

68. That, immediately after securing title as herein set forth, the predecessors in interest of Jay L. Henman and Ruth Henman constructed an irrigation ditch, tapping the Little Big Horn River, on its northerly bank, at a point about one-half mile due south of the common corner of sections 4-3-9 and 10, township 5 south of range 35 east and proceeded, almost directly due north, to a point about 300 feet east of the northwest corner of lot 5 in township 5 south of range 35 east. That through this ditch the predecessors in interest of Jay L. Henman and Ruth Henman conveyed water from

said Little Big Horn River to, over and upon approximately 58.6 acres on land situated in and being a part of said lands allotted to the various Indians as set forth in paragraph 64 of this affirmative defense as follows:

Prettyshield	#1167	30.4 acres
Crazy Sisterinlaw	#1175	15.2 acres
Goesahead	#1166	13.0 acres

and ever since then they and the defendants, Jay L. Henman and Ruth Henman, have conveyed water from said Little Big Horn River through the said ditch so constructed to, and upon, said lands and have continuously irrigated said lands with the water so conveyed through the said ditch.

69. That said lands, so irrigated, and all thereof, need and require one miner's inch of water per acre delivered upon said irrigated lands, for the proper irrigation thereof, that said ditch is approximately one-half mile in length before it reaches the land of Jay L. Henman and Ruth Henman, that in con- [72] veying the necessary water, for the irrigation of said tracts of land, from Little Big Horn River to said irrigated tracts of land, there is a loss of water, from seepage and evaporation, of approximately one miner's inch of water, therefore, Jay L. Henman and Ruth Henman need and require and are entitled to an appropriation of 60.0 miner's inches of water at the point where said water is diverted from Little Big Horn River, for the proper irrigation of the said 58.6 acres of irrigated land.

70. That, by the construction of the ditch described hereinbefore, by the diligence and efforts

and Ruth Henman to place said lands under irrigation, by the diversion of water from the said Little Big Horn River by the predecessors in interest of Jay L. Henman and Ruth Henman, and, by the use of the waters so diverted in the irrigation of the various tracts of land herein described by these answering defendants, and their predecessors in interest, the predecessors in interest of Jay L. Henman and Ruth Henman and these defendants appropriated and used 60.0 inches of water of said Little Big Horn River. That, ever since the first use of said water, these defendants and their predecessors in interest, have continually diverted and used that amount of water, from said Little Big Horn River, for the irrigation of these defendant's said lands. That by said diversion and use and because of the purchase of all rights of the Indian allottees to the use of said waters, these defendants acquired a vested water right in said Little Big Horn River for 60.0 inches of water as of the date May 7, 1868.

71. That, by mesne conveyances from said original patentees, Jay L. Henman and Ruth Henman are the owners of the legal title to all of the land described in paragraph 64 of this affirmative defense, together with the tenements, hereditaments [73] and appurtenances of whatsoever nature thereunto belonging, or in anywise appertaining, including each and every the water rights hereinabove set forth.

WHEREFORE, these answering defendants, M. H. Tschirgi and Bertha Tschirgi, pray that the bill be dismissed as against them, and

All of the other answering defendants having fully answered plaintiff's bill of complaint filed herein, pray;

That the bill be dismissed as against each of said answering defendants. That they, and each of them, be given judgment for their costs in this behalf incurred;

That they be not required to plead further;

That they be granted such other and further relief as they are, in equity, entitled to.

BURKE & COLLINS
By F. E. COLLINS and
BEN HARWOOD
By E. E. COLLINS
Attorneys for the Defendants, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller. [74]

State of Montana,
County of Yellowstone.—ss.

E. E. COLLINS being first duly sworn deposes and says:

That he is one of the attorneys for the defendants, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller, in the above entitled cause; that he makes this verification for and on behalf of the

said defendants for the reason that none of said defendants are now in Yellowstone County, Montana, where affiant resides and makes this affidavit; that he has read the foregoing answer, of said defendants, to the bill of complaint herein, and knows the contents thereof, and that the matter and things therein stated are true to the best of his knowledge, information and belief.

E. E. COLLINS

Subscribed and sworn to before me this 9th day of October, A. D. 1934.

[Seal] GUY C. DERRY

Notary Public for the State of Montana Residing at Billings, Montana.

My Commission expires Nov. 15, 1936.

Due and personal service of the above answer, is, hereby admitted and the receipt of a copy thereof acknowledged at Billings, Montana, this 9th day of October, 1934.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
By KENNETH R. L. SIMMONS,
District Counsel, Dept. of Interior, U. S. I. I. S.
KENNETH R. L. SIMMONS,
District Counsel, Dept. of Interior, U. S. I. I. S.

JOHNSTON, COLEMAN & JAMESON
By W. M. JOHNSTON
Attorneys for Defendants,
Nickels Dethlefsen,
Mary Dethlefsen. [75]

[Title of Court and Cause.]

State of Montana,
County of Yellowstone—ss.

Ruth Mehl being first duly sworn, deposes and says; That she is a stenographer in the office of Burke & Collins, who are attorneys for the defendants, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller, who make, the hereto attached, joint and several answer to plaintiff's Bill of Complaint filed herein; and that said attorneys, Burke & Collins, reside and have their offices at Billings, Montana.

That James H. Baldwin is the United States Attorney for the District of Montana, and, as such United States District Attorney, he is the Attorney for the plaintiff in the above entitled cause; that the said James H. Baldwin resides and has his office at Butte, Montana, and his address is James H. Baldwin, United States District Attorney for the District of Montana, Butte, Montana; that there is regular communication by United [76] States Mail between Billings, Montana and Butte, Montana. That on the 9th day of October, 1934, affiant deposited in the United States Post Office at Billings, Montana, a true and correct copy of the, hereto attached, joint and several answer of the defendants hereinabove named enclosed in an envelope, securely sealed, addressed and registered to the said,

James H. Baldwin, United States Attorney for the District of Montana, Butte, Montana, with postage thereon duly prepaid, to-wit; with postage prepaid thereon in the sum of fifty-one cents, the same being the postage demanded for the transmittal thereof.

(Signed) RUTH MEHL.

Subscribed and sworn to before me this 9th day of October A. D. 1934.

[Seal] (Signed) E. C. COLLINS,
Notary Public for the State of Montana, residing at Billings, Montana.

My commission expires August 21, 1936.

[Endorsed]: Filed October 10, 1934. [77]

Thereafter, on October 10th, 1934, the Joint and several Answers of defendants F. L. Yates, et al., were filed herein, in the words and figures following, to-wit: [78]

[Title of Court and Cause.]

JOINT AND SEPARATE ANSWER OF F. L. YATES AND EMMA E. YATES.

Comes now the above named Defendants, F. L. Yates and Emma E. Yates and, reserving all manner of exceptions to the uncertainties and imperfections of the bill, for their answer to the Bill of Complaint filed in the above entitled cause, allege, state and show to the Court as follows:

I.

These answering defendants allege that said Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity.

II.

Allege that said Bill of Complaint is insufficient in that it does not state the time nor the amount of any specific appropriation of water from Little Big Horn River nor from Lodge Grass Creek, nor from any tributary of either said river or said creek, for which reason it cannot be determined from said Bill of Complaint when plaintiff herein claims to have made a specific appropriation of any of said waters nor the amount of any such [79] appropriation.

III.

Allege that said Bill of Complaint, as to any water right appropriations which may have been made by plaintiff, does not set forth the necessary facts showing any such appropriations but merely pleads conclusions of law with reference thereto.

IV.

Allege that said Bill of Complaint is:

(a) Ambiguous;

(b) Uncertain; and

(c) Indefinite,

in that it cannot be determined from said Bill of Complaint when any particular alleged appropriation of water was made by plaintiff, nor the amount

of any such alleged appropriation of water, nor the means by which said appropriation of water was made, nor the use to which the water alleged to have been appropriated was applied.

V.

Admit that the defendants named in paragraph I of said bill of complaint are citizens and residents of the United States and of the State of Montana; that they reside within the confines of the Crow Reservation in Montana, and that the defendant Antler Land Company is a corporation created, organized and existing under and by virtue of the laws of the State of Montana.

VI.

Admit that on May 7, 1868, a treaty was entered into between the United States of America and the Crow Tribe or nation of Indians as described in Paragraph II of said Bill of Complaint; that exhibit "A", attached to said Bill of Complaint is a true copy of said treaty; that the exterior boundaries of said Crow Indian Reservation since April 27, 1904, have been, and now are, as described in said paragraph; that the lands within such bound- [80] aries now constitute the Crow Indian Reservation, and are located within the State of Montana, and that the lands owned and possessed by the above named defendants and described in said Bill of Complaint are located within the present

boundaries of said Crow Indian Reservation; deny that there is any Crow Indian Project Irrigation system, but admit that all lands irrigable through ditches constructed by the United States on said Crow Indian Reservation are located within the present boundaries of said reservation.

VII.

These defendants deny that they have any knowledge or information as to the intent and purpose of the United States of America in entering into the treaties mentioned in said bill of complaint, and they also deny that they have any knowledge or information as to the purpose of incorporating paragraph six in said treaty of May 7, 1868; and deny that in the adoption of the treaty of May 7, 1868, and in the creation of the Crow Indian Reservation, there was at that time reserved sufficient, or any, water of the reservation for the needs of the Crow Tribe or nation of Indians for irrigation, domestic or other purposes.

VIII.

Admit that at the time of the adoption of said treaty of May 7, 1868, and at all times since then, and now, all of the lands within said reservation were and are arid in character; that during all of the times mentioned in said bill of complaint large portions of said lands were adapted for pasturage and the feeding and grazing of horses, cattle and other livestock; deny that ever since the establishment of the Crow Reservation, the United States

and said Indians have had, and now have, large herds of cattle and large numbers of horses grazing upon the lands within said reservation, through which the Little Big Horn River, Lodge Grass Creek and their tributaries, flow; admit that there are some lands with- [81] in said reservation which, although arid, are, and at all of the times mentioned in said bill of complaint were, adapted for and susceptible to farming and cultivation, and the production of grass, grain and vegetables thereon; deny that they have any knowledge as to the amount of the lands so adapted to agricultural purposes; admit that such lands are arid in character and that in order to make them productive water is required for the purpose of the irrigation thereof; deny that said lands require one miner's inch of water for the irrigation of each acre, or any amount in excess of one-half of a miner's inch of water per acre for the proper irrigation thereof; deny that the irrigation ditches constructed on the Crow Indian Reservation by the United States of America for the irrigation of lands on said reservation constitute an irrigation project; allege that each of said ditches constitute a separate project; admit that in order to divert water from said Little Big Horn River, Lodge Grass Creek and their tributaries, for the irrigation of said lands, it is necessary to construct diversion dams, headgates, canals, ditches, flumes and laterals, at considerable expense, the amount of which is unknown to these answering defendants; deny that it is impossible for each in-

dividual Indian living within such reservation, or for a considerable number of such Indians acting together, to construct and maintain the necessary irrigation ditches and appurtenances for the irrigation of their lands within said reservation, and deny that without the expenditure of money by the Government of the United States, and the establishment of such irrigation works as have been constructed by it, it would be impossible for the majority of said Indians to farm and cultivate their lands on said reservation.

IX.

Admit that at the time of the ratification of said treaty of May 7, 1868, and ever since then, the Little Big Horn River was, has been, and now is, an existing, unnavigable stream of water, and [82] that it rises in the Big Horn mountains, flows in a northerly direction through a well defined channel, with natural banks, and in its natural course crosses the southern boundary of said reservation and flows into and through said reservation until it empties into the Big Horn River near Hardin, Montana.

X.

Deny that they have any knowledge or information as to the normal flow of the said Little Big Horn River and its tributaries, throughout the months of May, June, July, August, September or October in any year.

XI.

Admit that at the time of the ratification of the treaty of May 7, 1868, and at all of the times men-

tioned in said Bill of Complaint, Lodge Grass Creek was, and now is, an existing unnavigable stream of water rising in the Big Horn mountains and flowing northerly through a well defined channel with natural banks and in its natural course crosses the northern portion of said reservation and empties into the Little Big Horn River near Lodge Grass, Montana.

XII.

Deny that they have any knowledge or information as to the normal flow of said Lodge Grass Creek through the months of May, June, July, August, September or October of any year, and deny that the normal flow of said Little Big Horn River, Lodge Grass Creek, and their tributaries, are insufficient to irrigate all of the lands within the boundaries of said Crow Indian Reservation, diminished as set out in said bill of complaint, susceptible to farming and cultivation and to which the waters of said streams can be carried by the irrigation ditches described in said bill of complaint.

XIII.

Deny that the Secretary of the Interior, under or by virtue of any Act of Congress directed that an irrigation project be commenced and continued to its completion, which, when completed, [83] would bring water onto the greatest amount of land possible within such reservation, diminished as alleged in said Bill of Complaint; deny that the irrigation ditches constructed on said reservation and de-

scribed in said bill of complaint, are all parts of any one irrigation project or system; deny that they have any knowledge or information as to whether said irrigation ditches were constructed for further or advancing the civilization and improvement of said Crow Tribe of Indians; admit that the irrigation projects or systems constructed on said Crow Indian Reservation described in said Bill of Complaint consist of dams in said Little Big Horn River, said Lodge Grass Creek, and their tributaries, headgates, canals, ditches, flumes and lateral ditches, for the purpose of conveying water from said streams upon allotted lands on said Crow Indian reservation; deny that the construction of the Reno ditch was the commencement of the construction of a Crow irrigation project, or that the construction of said ditch was begun in the year 1885, or that its carrying capacity was originally 60 cu. ft. of water per second of time, or that it has been enlarged to a carrying capacity of 85 cu. ft. per second of time, or that any water was diverted through said ditch in the year 1885 from the Little Big Horn River for the irrigation of lands within said reservation; admit that since the construction of said Reno ditch, the date of which is unknown to these answering defendants, water has been diverted through said ditch for the irrigation of certain lands within said reservation; admit that thereafter plaintiff built other ditches, dams, headgates, flumes and canals through which waters were diverted from said river, creek and their tributaries

to and upon lands within said reservation, but deny that the same were units of, or parts of, any one irrigation project; admit that since said ditches, canals, flumes, dams and headgates were constructed, the time of the construction of which is unknown to these defendants, waters from said river, creek and their tributaries have been conveyed to lands [84] within said reservation, and have been used to some extent sporadically in the irrigation of said lands and for the purpose of farming and cultivating the same, and admit that said lands are semi-arid and could not be farmed, cultivated and made to produce profitably without the use of water for irrigation thereof.

XIV.

Admit that after the construction of said Reno ditch plaintiff has constructed other irrigation ditches, with the necessary appurtenances, for the irrigation of lands on said reservation, but deny that the same were or are parts of the same irrigation project; admit that plaintiff has constructed the Agency ditch, Forty Mile Ditch, Upper Little Horn No. 2 ditch, Lodge Grass No. 1 ditch, and Lodge Grass No. 2 ditch, but deny that they have any knowledge or information as to the year in which any one of said ditches was constructed, or as to the carrying capacity of any one of said ditches; deny that they have any knowledge or information as to what right, if any, plaintiff may have acquired to conduct water through the Bozeman Trail ditch, or the number of acres of allotted Indian lands

which plaintiff may irrigate with water conducted through said ditch; allege that there are about 4000 acres of land lying under said Bozeman Trail ditch which can be and are irrigated by water conveyed through said ditch from the Little Big Horn River, which lands are owned, occupied and farmed by persons who are not members of the Crow tribe of Indians, who should be made parties defendant in this suit in order to enable the Court to enter a proper decree adjudicating all water rights in and to the waters of said Little Big Horn River, Lodge Grass Creek, and their tributaries.

XV.

Admit that the ditches constructed by plaintiff, as pleaded in its bill of complaint, divert and take some of the waters of said Little Big Horn River, Lodge Grass Creek, and their [85] tributaries, and conduct and carry a portion of said waters to and upon certain Indian lands within said reservation.

XVI.

Deny that there are approximately 23,800 acres of land susceptible of cultivation if water were available, which lie under the ditches described in said bill of complaint deny that they have any knowledge or information as to the number of acres of land which are susceptible of being cultivated, that can be irrigated with water conducted through said ditches from said Little Big Horn River, Lodge Grass Creek, and their tributaries deny that the

normal flow of water from said river, creek and their tributaries is not sufficient to irrigate more than 15,000 acres of land lying under said ditches and within the limits of said reservation admit that no part of said lands can be irrigated except with waters which flow from said river, creek and their tributaries and deny that said lands cannot be irrigated in any other way than through ditches constructed by plaintiff and described in its bill of complaint.

XVII.

Deny that the ditches described in the bill of complaint herein constitute an irrigation project but allege that each ditch, with its appurtenances, is a separate irrigation project; deny that any irrigation project was commenced by plaintiff on said reservation in the year 1885, or that any such irrigation project was continued from that time to the present, and deny that they have any knowledge or information as to the cost and expense of construction of ditches by plaintiff on said Crow Indian reservation, or the amount thereof which has been paid from tribal funds of the Crow tribe of Indians.

XVIII.

Admit that a drouth was existing within the state of Montana at the time the bill of complaint herein was filed, but deny that at that time there were not more than 218 cu. ft of [86] water per second of time flowing in said river, creek, and their tributaries, and deny that at that time a flow of 84 cu.

ft. of water per second of time was being wrongfully or unlawfully or otherwise taken or diverted by the defendants named in the bill of complaint from said river, creek and their tributaries, and deny that they have any knowledge or information as to the amount of water then flowing in said river, creek and their tributaries, or the amount of water then diverted therefrom by the defendants named in said bill of complaint.

XIX.

Deny that the flow of water in said streams, and their tributaries, at the time said bill of complaint was filed, was insufficient to irrigate the lands lying under the various ditches described in said bill of complaint, which are susceptible of irrigation and cultivation, and which are included within the boundaries of said Crow Indian reservation, diminished as stated in said bill of complaint.

XX.

Admit that these answering defendants are now, and at the time of the filing of the bill of complaint herein were, in control and possession of—

> The Northeast Quarter (NE¼) of Section Seventeen (17), Township Nine (9) South, Range Thirty-three (33) East, M. P. M., Big Horn County, Montana;

deny that they have ever wrongfully or unlawfully diverted any waters from said Lodge Grass Creek, or that they have wrongfully or unlawfully used any of said waters from said creek upon the lands above

described; admit that they have diverted waters from said Lodge Grass Creek sufficient for the proper irrigation of approximately 62 acres of land, but allege that such diversion was lawful and under valid appropriations of water from said creek for the irrigation of said approximate 62 acres of land, and admit that no part of their said lands lies under any one of the ditches des- [87] cribed in the bill of complaint herein.

XXI.

Deny that these answering defendants have ever diverted or used any of the waters of said river, creek or their tributaries to which they were not lawfully entitled; deny that they have ever wrongfully or unlawfully diverted any waters from said river, creek or their tributaries; deny that their diversion of water from said Lodge Grass Creek was without the consent of plaintiff, or of its officers or agents, or of the superintendent of the Crow Indian Reservation, or of the Crow Tribe of Indians, or of anyone else who could lawfully give such consent; deny that they have obstructed the free or uninterrupted flow of waters in said river, creek, or their tributaries, by building dams therein, or otherwise, except as to the diversion of water from Lodge Grass Creek for the irrigation of said approximate 62 acres of land to which they are lawfully entitled; admit that if they have not taken such water from said Lodge Grass Creek by means of dams, headgates and ditches, said water

would flow down said Creek and into and through one or more of the irrigation ditches constructed by plaintiff on said reservation and upon lands susceptible of cultivation lying under one or more of said ditches; deny that said waters were or are necessary for the cultivation of such land or the growing of crops thereon; admit that they continue to take water from said creek for the irrigation of their said approximate 62 acres of land, and that they will continue to do so, but deny that they ever have, or are now, obstructing the free flow of waters in said river, creek, or their tributaries to which plaintiff, said Crow tribe of Indians, or any Crow Indian is entitled.

XXII.

Deny that they have been guilty of any wrongful or unlawful diversion of any of said waters; deny that plaintiff, or its Indian wards, or any of them, or any allottee of lands on said [88] reservation lying under any one of the irrigation ditches described in said bill of complaint, has suffered any injury, loss or damage by reason of the diversion of any of said waters by these answering defendants from said river, creek, or their tributaries; deny that any such injury, loss or damage will be suffered by them, or any of them, by reason of water which these answering defendants will divert from said river, creek, or their tributaries; deny that the crops growing upon the lands of the Indian wards of plaintiff at the time the bill of complaint herein was filed were being damaged or destroyed by reason of any water taken by these an-

swering defendants from said river, creek, or thei tributaries; deny that these defendants, or either o them, have ever interfered with any irrigatio project or ditch built or constructed by plaintiff o said Crow Indian reservation, or that plaintiff, o any one of its Indian wards, will suffer any los of damage because of any interference by thes defendants, or either of them, with any of sai irrigation ditches, or with any irrigation projec mentioned, or described, in said bill of complaint deny that plaintiff, or its said Indian wards, o any one of them has suffered, or will suffer, an loss or damage by reason of any water taken b these defendants, or either of them, from sai river, creek, or their tributaries, and deny tha these defendants, or either of them, have ever take any water from said river, or creek, or their tribu taries, to which plaintiff, or its Indian wards, o any one of them, is lawfully entitled.

XXIII.

Deny that plaintiff has no plain, speedy, ade quate, or complete remedy at law, or otherwise, fo the matters complained of in said bill of complaint and deny that plaintiff has no remedy whatsoeve except in a court of equity for the matters com plained of in said bill of complaint. [89]

XXIV.

AND FOR A FURTHER DEFENSE and b way of new matter, these answering defendant allege that there are a large number of white per

sons who own, occupy and farm lands lying in the valleys of the Little Big Horn River, of Lodge Grass Creek, and of their tributaries, which are susceptible of irrigation with waters from said stream or streams, and that said persons, have diverted large quantities of waters from said river, creek and their tributaries for the irrigation of their said lands; that the rights of said persons to so divert said waters of said river, creek and their tributaries for the irrigation of their said lands are similar to the rights of these answering defendants, and of their co-defendants, so to do; that there cannot be any complete adjudication as to water rights in said river, creek and their tributaries without joining all of said persons as parties defendant herein and that so far as these answering defendants are informed the owners of such lands so diverting waters from said creek, river and their tributaries for irrigation purposes upon their lands within the Crow Indian Reservation, are as follows, to-wit: E. F. Jensen, Barney LaDow, W. H. Spear, Red Gap Ranch, Inc., Bozeman Trail Ditch Company; Ford E. Hovey and Matt H. Tschirgi, as executors of the last will of Frank M. Heinrich, deceased; ..... Gilbert, Drake-Ballard Co., Daniel Sullivan, O. T. Souder, Daisy Spear, Estate of W. M. Spear, deceased, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bars Cattle Company.

AND FOR THEIR FIRST COUNTER CLAIM and as a cross bill of complaint, these answering

1. That, at all of the times herein mentioned, these defendants, and their predecessors in interest, were the owners, and these defendants are now the owners, and are entitled to the possession and use of—— [90]

The Northeast Quarter (NE¼) of Section Seventeen (17), Township Nine (9) South, Range Thirty-three (33) East, M.P.M., Big Horn County, Montana.

that all of said lands are arid in character and incapable of producing profitable crops unless artificially watered, but that such of said lands as are capable of being irrigated produce valuable crops of hay, grain, and vegetables, and that approximately 62 acres of said lands can be and are now, and for many years last past, as hereinafter alleged, have been, irrigated with water diverted from Lodge Grass Creek.

2. That, at the time these answering defendants acquired title to said land, they were, ever since then have been, and now are, husband and wife.

3. That on or about the 18th day of September, 1928, these answering defendants constructed an irrigation ditch tapping Lodge Grass Creek at a point about 800 feet West of the Southeast corner of the lands of these answering defendants and running in a Northerly direction and emptying into Percheron Creek, through which ditch these answering defendants conveyed water on and upon approximately 7 acres of garden and hay field and also for stock and domestic purposes, and ever since then these answering defendants through said

ditch, so constructed, have conveyed water from said Lodge Grass Creek to and upon said lands and for stock and domestic purposes, and are so continuing to conduct water through said ditch from said creek for said purposes.

4. That on or about the 26th day of September, 1928, these answering defendants constructed an irrigation ditch tapping Percheron Creek, a tributary of Lodge Grass Creek, at a point upon its left bank, which runs south approximately 87° east, approximately 1300 feet from the North Quarter corner of Section Eighteen, Township Nine South, Range Thirty-three East, thence running in a general Northeasterly direction upon the land of these answering defendants, through which ditch, these answering defendants conveyed water from [91] said Percheron Creek to, over and upon approximately 55 acres of land, situated and being in the Northwesterly portion of the land of these answering defendants, and that ever since then these answering defendants have conveyed water from said Percheron Creek through the ditch so constructed to and upon their said lands and are so continuing to conduct water through said ditch for the irrigation of their said land.

5. That said irrigation ditches are so constructed and maintained by these answering defendants since the aforesaid dates, were, have been and are, of such size and grade as to carry sufficient water from said Lodge Grass Creek for the irrigation of the land of these answering defendants, and from

these answering defendants, and of other lands to the West.

6. That said lands so irrigated, need and require one-half of one miner's inch of water per acre delivered upon said irrigated land for the proper irrigation thereof, and also an additional amount of water, the equivalent of one miner's inch for stock and domestic purposes, thus requiring at least 28 miner's inches from Percheron Creek and approximately five miner's inches from Lodge Grass Creek, or a total of thirty-three miner inches for the proper irrigation of their land and for stock and domestic purposes.

7. That by the construction of the ditches described herein, by the diversion of water from said Lodge Grass Creek and said Percheron Creek, and by the use of the water so diverted in the irrigation of the land herein described and for stock and domestic purposes, by these answering defendants, these answering defendants appropriated and used approximately 28 miner's inches of water from Percheron Creek and five miner's inches from Lodge Grass Creek upon the dates herein mentioned; that since then these answering defendants have continually diverted and used the said amounts of water from Lodge Grass Creek and Percheron Creek for the irrigation of their [92] lands and for stock and domestic purposes, and that by said diversion and use these defendants acquired a water right in said Percheron Creek and Lodge Grass Creek for the said amounts of water on the dates hereinabove mentioned.

8. That since the appropriation and first use of said waters of Lodge Grass Creek and Percheron Creek, by these defendants, as hereinbefore alleged, they have diverted and used the same without interruption during each irrigation season.

9. These answering defendants are informed and believe and therefore state the fact to be, that each and all of their co-defendants herein claim some rights in and to the use of the waters of Little Big Horn River, of Lodge Grass Creek, and of their tributaries, but that such claims of each and all of said co-defendants to said waters for any purpose whatever are subsequent in time and inferior in right to the right of these defendants to said waters, as hereinbefore pleaded.

10. That whatever rights, if any, plaintiff may have acquired to the use of any of the water of said river, or creek or any of their tributaries, are subsequent in time and inferior in right to the aforesaid water rights of these defendants appropriated, acquired and used, as hereinabove pleaded.

FOR THEIR SECOND COUNTER CLAIM AND AS A CROSS BILL OF COMPLAINT, these answering defendants allege:

1. That on January 12, 1927, Lulu L. McClure, was, ever since has been and now is a member of the Crow tribe of Indians, residing on the Crow Indian Reservation, in the State of Montana, and on said date, a patent by the United States, through the General Land Office, said patent being #994095, was issued to the said Lulu L. McClure, conveying

to her the said Northeast quarter of Section Seventeen, in Township Nine South, Range Thirty-three East, M.P.M. in Big Horn County, Montana.*

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*A. That prior to the year 1905, the plaintiff through its special allotting agent, John K. Rankin, duly and regularly allotted to one Back-bone, allotte No. 730, the above described tract of land as his individual property; That at said time, the said Backbone was a member of the said Crow Tribe of Indians and was residing on the said Crow Indian Reservation in the State of Montana; That after the said tract of land was allotted to the said Indian Backbone and after the reserved waters became vested in him, and became appurtenant to said tract of land, the said Backbone died and his said allottment was sold by the plaintiff as Guardian of Indian Wards at Public Sale to the said Lulu L. McClure, together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, and patent was duly issued and delivered to the said Lulu L. McClure, as aforesaid. [5/4/35. H. H. W.]

2. That thereafter, the said Lulu L. McClure, conveyed [93] said above described land, by Warranty Deed, to Emma Eames Yates, she being the same and identical person, as Emma E. Yates, one of the answering defendants, herein; that the plaintiff herein, in conveying the aforesaid lands, which were regularly allotted lands, to the said Lulu L. McClure, conveyed same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, and to their heirs and assigns.

3. That after acquiring said lands from said Lulu L. McClure, and on or about the 18th day of September, 1928, the said Emma Eames Yates, filed in the office of the County Clerk and Recorder of Big Horn County, Montana, Notice of Appropriation, which said Notice of Appropriation was filed in said office and duly recorded in Book six of Miscellaneous Records, at page 294 thereof, thereby appropriating fifty miner's inches of the waters of Lodge Grass Creek in said State and County, for irrigation and domestic purposes, a true, correct and complete copy of said appropriation being hereto attached, marked exhibit "A" and by reference incorporated in and made a part of the answer of these defendants as fully as if set out at length herein.

4. That after acquiring title from the said Lulu L. McClure to the said lands, and on the 26th day of September, 1928, the said Emma Eames Yates filed in the office of the County Clerk and Recorder of Big Horn County, Montana, Notice of Appropriation which said Notice was filed and duly recorded in Book six of Miscellaneous Records on Page 296 of said office, thereby appropriating 200 miner's inches of the waters of Percheron Creek, in said State and County, for irrigation and other purposes, a true correct and complete copy of which appropriation is hereto attached, marked Exhibit "B", and by reference incorporated in and made a part of the answer of these defendants as fully as if set out at length herein.

5. That since the said September 18th and 26th, 1928, these answering defendants have conveyed water from Lodge Grass Creek [94] and Percheron Creek ,through the above mentioned two ditches, to their lands, of which these answering defendants have since acquiring same from Lulu L. McClure, been and now are the owners of said tracts of land together with all the rights, privileges, immunities, appurtenances, tenaments and hereditaments thereunto belonging; and that these answering defendants were at the time of said conveyance, was made to them, ever since have been, and now are, husband and wife.

6. That said irrigation ditches so constructed, and so maintained by these answering defendants, was at the time of their construction, ever since have been and now are, of such size and grade as to carry sufficient water for the irrigation of their land.

7. That ever since the appropriation and first use of the waters of Lodge Grass Creek and Percheron Creek by these defendants, as hereinbefore alleged, they have diverted and use the same without interruption during each irrigation season, and that the lands of these answering defendants is of an arid nature and would be practically worthless without a sufficient amount of water for the irrigation of same.

8. That if the Crow tribe of Indians, and the individual members thereof, acquired any right to the use of the waters of the Little Big Horn River,

Lodge Grass Creek, and their tributaries, under and by virtue of treaty entered into between the United States of America, and the Crow tribe of Indians, on May 7, 1868, or under and by virtue of any other treaty or agreement between the, or under or by virtue of any statute of the United States of America, then these answering defendants, under the aforesaid conveyances from the individual members of the Crow tribe of Indians herein mentioned, acquired whatever rights said individual Crow Indians had to the use of the waters of said Lodge Grass Creek and its tributaries. [95]

WHEREFORE, these answering defendants pray that a decree of this Court be made and entered herein adjudging that these answering defendants acquired an appropriation of and the right to use at least five miner's inches of the water of said Lodge Grass Creek, as of date of September 18, 1928, and an appropriation and the right to use at least twenty-eight miner's inches of the waters of Percheron Creek, as of date of September 26, 1928; that they acquired, and are now the owners of, the right to the use of the waters of said Creeks, which the said Lulu L. McClure would not be entitled to, if she had not conveyed said lands, together with all the rights, privileges, immunities, appurtenances, tenements and hereditaments thereunto belonging to these answering defendants, and that by such decree and judgment of this Court

these answering defendants have such other
further relief as in equity they are entitled to.

ROY BEDFORD and
TANSIL & LAMB
By JOHN B. TANSIL
Attorneys for Defendants, F
Yates and Emma E. Yates.

State of Montana
County of Yellowstone—ss.

John B. Tansil, being first duly sworn, dep
and says: That he is one of the attorneys for
defendants, F. L. Yates and Emma E. Yates in
above entitled cause; that he makes this verif
tion for and on behalf of said defendants for
reason that neither of said defendants is now
Yellowstone County, Montana, where affiant
sides and makes this affidavit; that he has read
foregoing answer of said defendants to bill of c
plaint herein and knows the contents thereof,
that the matters and things therein stated are t
to the best of his knowledge, information and bel

JOHN B. TANSIL

Subscribed and sworn to before me, this the
day of October, 1934.

[Seal] R. G. WIGGENHORN
Notary Public in and for the State of Montana,
siding at Billings, Montana. My Commiss
expires June 23, 1937.

Service of the foregoing answers and receipt of copy of same duly acknowledged this the 9th day of October, 1934.

KENNETH R. L. SIMMONS
Dist. Counsel, Dept. of Interior, U.S.I.I.S. [96]

EXHIBIT "A"

NOTICE OF APPROPRIATION

State of Montana
County of Big Horn—ss.

TO ALL WHOM THESE PRESENTS MAY CONCERN: BE IT KNOWN, That Emma Eames Yates of Wyola, in said County and State, do hereby publish and declare, as a legal notice to all the world as follows, to-wit:

1. That she did on Sept. 18, 1928, appropriate and now has a legal right to the use, possession, and control of and claim Fifty miner's inches (being 1¼ cubic feet per second of time) of the waters of Lodge Grass Creek in said County and State, for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for irrigation, domestic and stock purposes; and the place of intended use of said water is the NE4 of Section 17, Twp. 9 S., R. 33 E. The point of diversion of said ditch is to be about 820 feet west of the southeast corner of the said lands.

III. That the means of diversion....., with size of flume, ditch, pipe or aqueduct by which she intends to divert the said water is as follows: A ditch 36 inches by 72 inches in size which carries and conducts fifty inches of water from said creek which said ditch diverts the water from said stream at a point upon its west bank, and runs thence north west over and across said lands. Ten inches of the above appropriation is hereby to be used and is claimed by the appropriation for irrigation, domestic and stock use on the east side of said creek on the lands herein-above described. With a point of diversion about 800 feet west of the southeast corner of said lands, thence over and upon said land.

IV. That she appropriated and took said water on the 18th day of September, A. D. 1928 by means of said ditch. [97]

V. That the name of the appropriator of said water is Emma Eames Yates.

VI. That she also hereby claims ditch, and the right of way therefor, and for said water by it conveyed, or to be conveyed from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed or to be constructed, by her in appropriating, and in using said water.

VII. That she also claims the right to keep in repair and enlarge said means of water appropriation at any time, and the right to dispose of said

right, water, ditch or said appurtenances in part or whole, at any time.

CLAIMING THE SAME ALL AND SINGULAR, under any and all laws National and State, and all rulings and decisions thereunder, in the matter of water rights.

TOGETHER WITH ALL AND SINGULAR, the hereditaments and appurtenances thereunto belonging, and appertaining, or to accrue to the same.

WITNESS my hand at Hardin, Montana, this 18th day of September, 1928.

EMMA EAMES YATES

State of Montana
County of Big Horn—ss.

Emma Eames Yates having been first duly sworn, deposes and says that she is of lawful age and the appropriator and claimant of the order and water right mentioned in the foregoing notice of appropriation and claim and the person whose name is subscribed thereto as the appropriator and claimant, that she knows the contents of said foregoing notice and that the matters and things therein stated are true.

EMMA EAMES YATES. [98]

Subscribed and sworn to before me this 18th day of September, 1928.

[Notarial Seal] KENNETH A. LEWIS
Notary Public for the State of Montana. Residing at Hardin, Montana. My commission expires June 25, 1931.

Filed for record this 18th day of September, A. D. 1928 at 1:40 o'clock P. M. Carl Rankin, County Clerk and Recorder, by Ray C. Thompson, Deputy.

Instrument No. 44792.

Recorded in "6" Miscellaneous Record, Page 294, Records Big Horn County, Montana. [99]

EXHIBIT "B"

NOTICE OF APPROPRIATION

State of Montana
County of Big Horn—ss.

TO ALL WHOM THESE PRESENTS MAY CONCERN: BE IT KNOWN, That Emma Eames Yates, of Wyola, in said County and State do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That she did on Sept. 26th, 1928, appropriate and now has a legal right to the use, possession and control of and claim Three Hundred Twenty (320) miner's inches (being 8 cubic feet per second of time) of the waters of Percheron Creek in said County and State for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for irrigation, stock purposes and domestic use; The irrigation will cover approximately 80 acres of land described as the West Half (W½) of the North-

east Quarter (NE¼) of Section Seventeen (17) Twp. Nine (9) South, Range Thirty-three (33 East).

III. That the means of diversion, with size of flume, ditch, pipe, or aqueduct by which she intends to divert the said water is as follows: A ditch 18 inches by 48 inches in size which carries and conducts 320 inches of water from said Creek which said ditch diverts the water from said stream at a point upon its left bank and runs thence south approximately 87 degrees east approximately 1300 feet from the north quarter corner of Sec. 18, Twp. 9 S. Rge 33 East, thence runs in a general northeasterly direction thence over and upon said land.

IV. That she appropriated and took said water on the 26th day of September A. D. 1928, by means of said ditch.

V. That the name of the appropriator of said water is Emma Eames Yates. [100]

VI. That she also hereby claims said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge and also the right of location upon any lands of any dams, flumes, reservoirs, constructed or to be constructed by her in appropriating, and in using said water.

VII. That she also claims the right to keep in repair and enlarge said means of water appropriation at any time, and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

CLAIMING THE SAME ALL AND SINGULAR, Under any and all laws National and State, and court rulings and decisions thereunder, in the matter of water rights.

TOGETHER WITH ALL AND SINGULAR, The hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

WITNESS her hand at Hardin, Montana, this 26th day of September, 1928.

EMMA EAMES YATES

State of Montana
County of Big Horn—ss.

Emma Eames Yates having been first duly sworn, deposes and says, that she is of lawful age and that she is the appropriator and claimant of the order and water right mentioned in the foregoing notice of appropriation and claim and the person whose name is subscribed thereto as the appropriator and claimant, that she knows the contents of said foregoing notice and that the matters and things therein stated are true.

EMMA EAMES YATES [101]

Subscribed and sworn to before me this 26th day of September, 1928.

[Notarial Seal] KENNETH A. LEWIS
Notary Public for the State of Montana residing at Hardin, Montana.

My commission expires June 25th, 1931.

Filed for record this 26th day of September, A. D. 1928 at 2:50 o'clock P. M. Instrument No. 44908. Carl Rankin, County Clerk and Recorder. By Ray C. Thompson, Deputy.

Recorded in Miscellaneous Record "6", Page 296, Records of Big Horn County, Montana.

[Endorsed]: Filed October 10th, 1934. [102]

Thereafter, on October 10, 1934, the Joint and Several Answers of Defendants Nickels Dethlefsen, et al., were filed herein, in the words and figures as follows, to-wit: [103]

[Title of Court and Cause.]

JOINT AND SEVERAL ANSWERS OF NICKELS DETHLEFSEN AND MARY DETHLEFSEN TO THE BILL OF COMPLAINT.

NOW COME Nickels Dethlefsen and Mary Dethlefsen, two of the above named defendants, and for answer to plaintiff's bill of complaint herein, say:

1. These answering defendants allege that said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

2. Allege that said bill of complaint is insufficient in that it does not state the time nor the amount of any specific appropriation of water from Little Big Horn River nor from Lodge Grass Creek, nor from any tributary of either said river

or said creek, for which reason it cannot be determined from said bill of complaint when plaintiff herein claims to have made a specific appropriation of any of said waters nor the amount of any such appropriation. [104]

3. Allege that said bill of complaint, as to any water right appropriations which may have been made by plaintiff, does not set forth the necessary facts showing any such appropriations but merely pleads conclusions of law with reference thereto.

4. Allege that said bill of complaint is—

(a) Ambiguous;

(b) Uncertain; and

(c) Indefinite,

in that it cannot be determined from said bill of complaint when any particular alleged appropriation of water was made by plaintiff, nor the amount of any such alleged appropriation of water, nor the means by which said appropriation of water was made, nor the use to which the water alleged to have been appropriated was applied.

5. Admit that the defendants named in paragraph I of said bill of complaint are citizens and residents of the United States and of the state of Montana; that they reside within the confines of the Crow Reservation in Montana, and that the defendant Antler Land Company is a corporation created, organized and existing under and by virtue of the laws of the state of Montana.

6. Admit that on May 7, 1868, a treaty was entered into between the United States of America and the Crow Tribe or nation of Indians as de-

scribed in paragraph II of said bill of complaint; that exhibit "A", attached to said bill of complaint is a true copy of said treaty; that the exterior boundaries of said Crow Indian Reservation since April 27, 1904, have been, and now are, as described in said paragraph; that the lands within such boundaries now constitute the Crow Indian Reservation, and are located within the State of Montana, and that the lands owned and possessed by the above named defendants and described in said bill of complaint are located within the present boundaries [105] of said Crow Indian Reservation; deny that there is any Crow Indian Project Irrigation system, but admit that all lands irrigable through ditches constructed by the United States on said Crow Indian Reservation are located within the present boundaries of said reservation.

7. These defendants deny that they have any knowledge or information as to the intent and purpose of the United States of America in entering into the treaties mentioned in said bill of complaint and deny that they have any knowledge or information as to the purpose of incorporating paragraph or article 6 in said treaty of May 7, 1868; and deny that in the adoption of the treaty of May 7, 1868, and in the creation of the Crow Indian Reservation, there was at that time reserved sufficient or any water of the reservation for the needs of the Crow Tribe or nation of Indians for irrigation, domestic or other purposes.

8. Admit that at the time of the adoption of said treaty of May 7, 1868, and at all times since then,

and now, all of the lands within said reservation were and are arid in character; that during all of the times mentioned in said bill of complaint large portions of said lands were adapted for pasturage and the feeding and grazing of horses, cattle and other livestock; deny that ever since the establishment of the Crow Reservation the United States and said Indians have had, and now have, large herds of cattle and large numbers of horses grazing upon the lands within said reservation, through which the Little Big Horn River, Lodge Grass Creek, and their tributaries, flow; admit that there are some lands within said reservation which, although arid, are, and at all of the times mentioned in said bill of complaint were, adapted for and susceptible to farming and cultivation, and the production of grass, grain and vegetables thereon; deny that they have any knowledge as to the amount of the lands so adapted to agricultural purposes; admit that such lands are arid in charac- [106] ter and that in order to make them productive water is required for the purpose of the irrigation thereof; deny that said lands require one miner's inch of water for the irrigation of each acre, or any amount in excess of one-half of a miner's inch of water per acre for the proper irrigation thereof; deny that the irrigation ditches constructed on the Crow Indian Reservation by the United States of America for the irrigation of lands on said reservation constitute an irrigation project; allege that each of said ditches constitutes a separate project; admit that in order to divert water from said Little Big

Horn River, Lodge Grass Creek, and their tributaries, for the irrigation of said lands, it is necessary to construct diversion dams, headgates, canals, ditches, flumes and laterals, at considerable expense, the amount of which is unknown to these answering defendants; deny that it is impossible for each individual Indian living within such reservation, or for a considerable number of such Indians acting together, to construct and maintain the necessary irrigation ditches and appurtenances for the irrigation of their lands within said reservation, and deny that without the expenditure of money by the Government of the United States, and the establishment of such irrigation works as have been constructed by it, it would be impossible for the majority of said Indians to farm and cultivate their lands on said reservation.

9. Admit that at the time of the ratification of said treaty of May 7, 1868, and ever since then, the Little Big Horn River was, has been, and now is, an existing, unnavigable stream of water, and that it rises in the Big Horn mountains, flows in a northerly direction through a well defined channel, with natural banks, and in its natural course crosses the southern boundary of said reservation and flows into and through said reservation until it empties into the Big Horn River near Hardin, Montana.

[107]

10. Deny that they have any knowledge or information as to the normal flow of the said Little Big Horn River and its tributaries, throughout the

months of May, June, July, August, September or October in any year.

11. Admit that at the time of the ratification of the treaty of May 7, 1868, and at all of the times mentioned in said bill of complaint, Lodge Grass Creek was, and now is, an existing unnavigable stream of water rising in the Big Horn mountains and flowing northerly through a well defined channel with natural banks and in its natural course crosses the northern portion of said reservation and empties into the Little Big Horn River near Lodge Grass, Montana.

12. Deny that they have any knowledge or information as to the normal flow of said Lodge Grass Creek through the months of May, June, July, August, September or October of any year, and deny that the normal flow of said Little Big Horn River Lodge Grass Creek, and their tributaries, are insufficient to irrigate all of the lands within the boundaries of said Crow Indian Reservation diminished as set out in said bill of complaint, susceptible to farming and cultivation and to which the waters of said streams can be carried by the irrigation ditches described in said bill of complaint.

13. Deny that the Secretary of the Interior under or by virtue of any Act of Congress directed that an irrigation project be commenced and continued to its completion, which, when completed would bring water onto the greatest amount of land possible within such reservation, diminished as alleged in said bill of complaint; deny that the irrigation ditches constructed on said reservation an

described in said bill of complaint, are all parts of any one irrigation project or system; deny that they have any knowledge or information as to whether said irrigation ditches were constructed for furthering or advancing the civiliza- [108] tion and improvement of said Crow Tribe of Indians; admit that the irrigation projects or systems constructed on said Crow Indian Reservation described in said bill of complaint consist of dams in said Little Big Horn River, said Lodge Grass Creek, and their tributaries, headgates, canals, ditches, flumes and lateral ditches, for the purpose of conveying water from said streams upon allotted lands on said Crow Indian reservation; deny that the construction of the Reno ditch was the commencement of the construction of a Crow irrigation project, or that the construction of said ditch was begun in the year 1885, or that its carrying capacity was originally 60 cu. ft. of water per second of time, or that it has been enlarged to a carrying capacity of 85 cu. ft. per second of time, or that any water was diverted through said ditch in the year 1885 from the Little Big Horn River for the irrigation of lands within said reservation; admit that since the construction of said Reno ditch, the date of which is unknown to these answering defendants, water has been diverted through said ditch for the irrigation of certain lands within said reservation; admit that thereafter plaintiff built other ditches, dams, headgates, flumes and canals through which waters were diverted from said river, creek and their tributaries

that the same were units of, or parts of, any one irrigation project; admit that since said ditches, canals, flumes, dams and headgates were constructed, the time of the construction of which is unknown to these defendants, waters from said river, creek and their tributaries have been conveyed to lands within said reservation, and have been used to some extent sporadically in the irrigation of said lands and for the purpose of farming and cultivating the same, and admit that said lands are semi-arid and could not be farmed, cultivated and made to produce profitably without the use of water for irrigation thereof, [109].

14. Admit that after the construction of said Reno ditch plaintiff has constructed other irrigation ditches, with the necessary appurtenances, for the irrigation of lands on said reservation, but deny that the same were or are parts of the same irrigation project; admit that plaintiff has constructed the Agency ditch, Forty Mile Ditch, Upper Little Horn No. 2 ditch, Lodge Grass No. 1 ditch, and Lodge Grass No. 2 ditch, but deny that they have any knowledge or information as to the year in which any one of said ditches was constructed, or as to the carrying capacity of any one of said ditches; deny that they have any knowledge or information as to what right, if any, plaintiff may have acquired to conduct water through the Bozeman Trail ditch, or the number of acres of allotted Indian lands which plaintiff may irrigate with water conducted through said ditch; allege that there

are about 4000 acres of land lying under said Bozeman Trail ditch which can be and are irrigated by water conveyed through said ditch from the Little Big Horn River, which lands are owned, occupied and farmed by persons who are not members of the Crow tribe of Indians, who should be made parties defendant in this suit in order to enable the Court to enter a proper decree adjudicating all water rights in and to the waters of said Little Big Horn River, Lodge Grass Creek, and their tributaries.

15. Admit that the ditches constructed by plaintiff, as pleaded in its bill of complaint, divert and take some of the waters of said Little Big Horn River, Lodge Grass Creek, and their tributaries, and conduct and carry a portion of said waters to and upon certain Indian lands within said reservation.

16. Deny that there are approximately 23,000 acres of land susceptible of cultivation if water were available, which lie under the ditches described in said bill of complaint; deny that they have any knowledge or information as to the number of [110] acres of land which are susceptible of being cultivated, that can be irrigated with water conducted through said ditches from said Little Big Horn River, Lodge Grass Creek, and their tributaries; deny that the normal flow of water from said river, creek and their tributaries is not sufficient to irrigate more than 15,000 acres of land lying under said ditches and within the limits of said reservation; admit that no part of said lands can be irri-

river, creek and their tributaries; and deny that said lands cannot be irrigated in any other way than through the ditches constructed by plaintiff and described in its bill of complaint.

17. Deny that the ditches described in the bill of complaint herein constitute an irrigation project but allege that each ditch, with its appurtenances, is a separate irrigation project; deny that any irrigation project was commenced by plaintiff on said reservation in the year 1885, or that any such irrigation project was continued from that time to the present, and deny that they have any knowledge or information as to the cost and expense of construction of ditches by plaintiff on said Crow Indian reservation, or the amount thereof which has been paid from tribal funds of the Crow tribe of Indians.

18. Admit that a drouth was existing within the State of Montana at the time the bill of complaint herein was filed, but deny that at that time there was not more than 218 cu. ft. of water per second of time flowing in said river, creek, and their tributaries, and deny that at that time a flow of 84 cu. ft. of water per second of time was being wrongfully or unlawfully or otherwise taken or diverted by the defendants named in the bill of complaint from said river, creek and their tributaries, and deny that they have any knowledge or information as to the amount of water then flowing in said river, creek and their tributaries, or the amount of

19. Deny that the flow of water in said streams, and their tributaries, at the time said bill of complaint was filed, was insufficient to irrigate the lands lying under the various ditches, described in said bill of complaint, which are susceptible of irrigation and cultivation, and which are included within the boundaries of said Crow Indian reservation, diminished as stated in said bill of complaint.

20. Admit that these answering defendants are now, and at the time of the filing of the bill of complaint herein were, in control and possession of—

The southeast quarter of the southeast quarter of section thirteen, township eight south, range thirty-three east, M.P.M.; the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, the north half of the southeast quarter, of section eighteen, the southeast quarter of the southwest quarter, the south half of the southeast quarter of section seven, township eight south, range thirty-four east, M.P.M., lots three and four, the southeast quarter of the southwest quarter, the south half of the southeast quarter, of section eighteen, township eight south, range thirty-four east, M.P.M., in Big Horn County, Montana;

deny that they have ever wrongfully or unlawfully diverted any waters from said Lodge Grass Creek, or that they have wrongfully or unlawfully used any

proper irrigation of 100 acres of said lands, but allege that such diversion was lawful and under valid appropriations of water from said creek for the irrigation of said 100 acres of land, and admit that no part of their said lands lies under any one of the ditches described in the bill of complaint herein.

21. Deny that these answering defendants have ever diverted or used any of the waters of said river, creek or their tributaries to which they were not lawfully entitled; deny [112] that they have ever wrongfully or unlawfully diverted any waters from said river, creek or their tributaries; deny that their diversion of water from said Lodge Grass Creek was without the consent of plaintiff, or of its officers or agents, or of the superintendent of the Crow Indian reservation, or of the Crow tribe of Indians, or of anyone else who could lawfully give such consent; deny that they have obstructed the free or uninterrupted flow of waters in said river, creek, or their tributaries, by building dams therein, or otherwise, except as to the diversion of water from Lodge Grass Creek for the irrigation of said 100 acres of land to which they are lawfully entitled, admit that if they had not taken such water from said Lodge Grass Creek by means of dams, headgates and ditches, said water would flow down said Creek and into and through one or more of the irrigation ditches constructed by plaintiff on said reservation and upon lands susceptible of cultivation lying under one or more of said ditches;

deny that said waters were or are necessary for the cultivation of such land or the growing of crops thereon; admit that they continue to take water from said creek for the irrigation of their said 100 acres of land, and that they will continue to do so, but deny that they ever have, or are now, obstructing the free flow of water in said river, creek, or their tributaries to which plaintiff, said Crow tribe of Indians, or any Crow Indian is entitled.

22. Deny that they have been guilty of any wrongful or unlawful diversion of any of said waters; deny that plaintiff, or its Indian wards, or any of them, or any allottee of lands on said reservation lying under any one of the irrigation ditches described in said bill of complaint, has suffered any injury, loss or damage by reason of the diversion of any of said waters by these answering defendants from said river, creek, or their tributaries; deny that any such injury, loss or damage [113] will be suffered by them, or any of them, by reason of water which these answering defendants will divert from said river, creek, or their tributaries; deny that the crops growing upon the lands of the Indian wards of plaintiff at the time the bill of complaint herein was filed were being damaged or destroyed by reason of any water taken by these defendants from said river, creek, or their tributaries; deny that these defendants, or either of them, have ever interfered with any irrigation project or ditch built or constructed by plaintiff on said Crow Indian reservation, or that plaintiff, or any one of its

Indian wards, will suffer any loss or damage because of any interference by these defendants, or either of them, with any of said irrigation ditches, or with any irrigation project mentioned, or described, in said bill of complaint; deny that plaintiff, or its said Indian wards, or any one of them, has suffered, or will suffer, any loss or damage by reason of any water taken by these defendants, or either of them, from said river, creek, or their tributaries, and deny that these defendants, or either of them, have ever taken any water from said river, or creek, or their tributaries, to which plaintiff, or its Indian wards, or any one of them, is lawfully entitled.

23. Deny that plaintiff has no plain, speedy, adequate, or complete remedy at law, or otherwise, for the matters complained of in said bill of complaint, and deny that plaintiff has no remedy whatsoever except in a court of equity for the matters complained of in said bill of complaint.

24. For a further defense and by way of new matter, these answering defendants allege that there are a large number of white persons who own, occupy and farm lands lying in the valleys of the Little Big Horn River, of Lodge Grass Creek, and of their tributaries, which are susceptible of irrigation with waters from said stream or streams, and that said persons [114] have diverted large quantities of waters from said river, creek and their tributaries for the irrigation of their said lands; that the rights of said persons to so divert said waters of said river, creek and their tributaries for the irri-

gation of their said lands and similar to the rights of these answering defendants, and of their co-defendants, so to do; that there cannot be any complete adjudication as to water rights in said river, creek and their tributaries without joining all of said persons as parties defendant herein and that so far as these answering defendants are informed the owners of such lands so diverting waters from said river, creek and their tributaries for irrigation purposes upon their lands within the Crow Indian Reservation, are as follows, to-wit: E. F. Jensen, Barney LaDow, W. H. Spear, Red Gap Ranch Inc., Rozeman Trail Ditch Company; Ford E. Hovey and Matt H. Tschirgi, as executors of the last will of Frank M. Heinrich, deceased; ..... Gilbert, Drake-Ballard Co., Daniel Sullivan, O. T. Bouder, Daisy Spear, Estate of W. M. Spear, deceased, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bars Cattle Company; that the waters so diverted by said persons from said river, creek and their tributaries, are taken therefrom at points above the places where plaintiff diverts waters from said river, creek and their tributaries, for the irrigation of lands on said Crow Indian Reservation. [4/30/35 H. H. W.]

II.

For their first counter claim and as a cross bill of complaint, these answering defendants complain and allege:

1. That, at all of the times herein mentioned, these defendants, and their predecessors in interest, were the owners, and these defendants now are the owners, and are entitled to the possession and use of—

> The southeast quarter of the southeast quarter of section thirteen, in township eight south of range thirty-three east, M.P.M.; the west half of the southwest quarter of section eighteen; and the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section seven, all in township eight south of range thirty-four east of the Montana Meridian in Montana, and all situated and being in Big Horn County, Montana. [115]

that all of said lands are arid in character and incapable of producing profitable crops unless artificially watered, but that such of said lands as are capable of being irrigated produce valuable crops of hay, grain, and vegetables, and that 100 acres of said lands can be and are now, and for many years last past, as hereinafter alleged, have been, irrigated with water diverted from Lodge Grass Creek.

2. That, at the time these answering defendants acquired title to said land, they were, ever since then have been, and now are, husband and wife.

3. That on or about May 1, 1893, the predecessors in interest of these answering defendants constructed an irrigation ditch tapping Lodge Grass Creek on the northerly bank thereof at a point

about 1200 feet east of the center of section twenty-four, in township eight south, range thirty-three east, M.P.M., and running from thence in a northeasterly direction to the north line of said southwest quarter of the southeast quarter of section seven, in township eight south of range thirty-four east, M.P.M., through which said predecessors in interest of these defendants conveyed water from said Lodge Grass Creek to, over and upon approximately 73 acres of land situated in and being a part of the above described tracts of land so owned by these answering defendants, and that ever since then said predecessors in interest of these defendants, and these defendants, have conveyed water from said Lodge Grass Creek, through the ditch so constructed, to and upon said lands and have irrigated said lands with the waters so conveyed through said ditch during all of the times herein mentioned; and are so continuing to conduct water through said ditch from said creek for the irrigation of their said lands.

4. That on or about May 1, 1922, these answering defendants conveyed water from said Lodge Grass Creek to an additional 27 acres of land in said tracts for the irrigation thereof, [116] and ever since then they have continued to irrigate said additional 27 acres of land with waters conveyed from said Lodge Grass Creek through said ditch to said lands.

5. That said irrigation ditch as so constructed and maintained by the predecessors in interest of these answering defendants, and as maintained by

these answering defendants since they acquired ownership thereof in the year 1922, was, has been, and is, of such size and grade as to carry 91.6 miner's inches of water from said Lodge Grass Creek to, over, and upon, said 100 acres of irrigated land for the irrigation thereof.

6. That said lands so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre delivered upon said irrigated land for the proper irrigation thereof; that said ditch is approximately two miles in length and that in conveying the necessary water for the irrigation of said tracts of land from Lodge Grass Creek to said irrigated tracts of land, there is a loss of water from seepage and evaporation of approximately five miner's inches, because of which fact these answering defendants need and require and are entitled to an appropriation of fifty-five miner's inches of water at the point where said water is diverted from Lodge Grass Creek, for the proper irrigation of their said 100 acres of irrigated land.

7. That in or about the year 1922 these defendants changed the point of diversion of said water from Lodge Grass Creek to a point approximately 1400 feet east and 660 feet north of the center line of said section twenty-four, which is now the point of diversion of said water for the irrigation of their said lands through their said irrigation ditch.

8. That by the construction of the ditch described herein, by the diversion of water from said Lodge Grass Creek by the predecessors in interest of these defendants, and by the use of the waters so

diverted in the irrigation of the various tracts [117] of land herein described by these answering defendants, and their predecessors in interest, the predecessors in interest of these defendants and these defendants appropriated and used fifty-five miner's inches of water of said Lodge Grass Creek upon the dates herein mentioned; that ever since then these defendants, and their predecessors in interest, have continually diverted and used that amount of water from said Lodge Grass Creek for the irrigation of said lands of these defendants, and that by said diversion and use these defendants acquired a water right in said Lodge Grass Creek for forty miner's inches of water as of the date of May 1, 1893, and fifteen miner's inches of water as of the date of May 1, 1922.

9. That ever since the appropriation and first use of said fifty-five miner's inches of the waters of Lodge Grass Creek by these defendants and their predecessors in interest as hereinbefore alleged, they have diverted and used the same without interruption during each irrigation season.

10. These answering defendants are informed and believe, and therefore state the fact to be, that each and all of their co-defendants herein claim some rights in and to the use of the waters of Little Big Horn River, of Lodge Grass Creek, and of their tributaries, but that such claims of each and all of said co-defendants to said waters for any purpose whatever are subsequent in time and inferior in right to the right of these defendants to said waters as hereinbefore pleaded.

11. That whatever rights, if any, plaintiff may have acquired to the use of any of the waters of said river, or creek, or any of their tributaries, are subsequent in time and inferior in right to the aforesaid water rights of these defendants, appropriated, acquired and used as hereinbefore pleaded.

III.

For their second counter claim and as a cross bill [118] of complaint, these answering defendants allege:

1. That Rosa Peters, Arthur Peters, George Peters and Alice Peters are now, and during their life time have been, members of the Crow Tribe of Indians; that they do now reside, and always have resided, on the Crow Indian Reservation in the state of Montana; and that the said Arthur Peters, George Peters and Alice Peters are the children of the said Rosa Peters and her husband, Oliver E. Peters, who is a white man.

2. That some time prior to the year 1893 the said Rosa Peters selected as her allotment of lands in the Crow Indian Reservation—

> The southeast quarter of the southwest quarter, and the south half of the southeast quarter of section seven; the northwest quarter, and the northeast quarter of the southwest quarter of section seventeen; all in township eight south of range thirty-four east of the Montana Meridian in Montana;

that at that time the said Arthur, George and Alice Peters were minor children and their father, Oliver

E. Peters, the head of their family, selected as the allotment of lands in said Crow Indian Reservation for said minors, the following described tracts of land for the said Arthur Peters:

Lot three of section eighteen, and the north half of the northeast quarter, and the southwest quarter of the northeast quarter of section seventeen, all in township eight south of range thirty-four east of the Montana Meridian in Montana;

For the said George Peters:

Lot four, the south half of the southeast quarter, and the southeast quarter of the southwest quarter of section eighteen, in township eight south of range thirty-four east of the Montana Meridian in Montana,

And for the said Alice Peters:

The southeast quarter of the southeast quarter of section thirteen, in township eight south, of range thirty-three east of said Meridian; the west half of the northwest quarter of section sixteen, and the southeast quarter of the northeast quarter of section seventeen, in township eight south of range thirty-four east of said Meridian. [119]

3. That on or about May 1, 1893, the said Rosa Peters, for herself, and the said Oliver E. Peters, acting for their said minor children, constructed an irrigation ditch tapping Lodge Grass Creek on the northerly bank thereof, at a point about 1200 feet east of the center of section twenty-four, in township eight south, range thirty-three east,

M.P.M., and running from thence in a northeasterly direction to the north line of the southwest quarter of the southeast quarter of section seven, in township eight south of range thirty-four east, M.P.M., through which they conveyed water from said Lodge Grass Creek to, over and upon approximately 73 acres of land situated in and being a part of—

> The southeast quarter of the southeast quarter of section thirteen, in township eight south of range thirty-three east, M.P.M.; the west half of the southwest quarter of section eighteen; and the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section seven, all in township eight south of range thirty-four east of the Montana Meridian in Montana, and all situated and being in Big Horn County, Montana,

and ever since then they, and these answering defendants, have conveyed water from said Lodge Grass Creek through the ditch so constructed to and upon said lands and have irrigated said lands with the waters so conveyed through said ditch during all of the times herein mentioned; and that these answering defendants are so continuing to conduct water through said ditch from said Creek for the irrigation of said lands.

4. That in or about the year 1901, a duly appointed special allotting agent for the allotment of lands in severalty to the members of the Crow tribe of Indians, duly and regularly allotted to the said

Rosa Peters, Arthur Peters, George Peters and Alice Peters the lands described in paragraph 2 of this counter-claim and cross bill of complaint, and that at the time said allotments were so made the 73 acres of lands so irrigated by said Crow Indians and by Oliver E. Peters, father of said minor Crow Indians, [120] were under the aforesaid irrigation project so constructed by them and were irrigable and being irrigated with water from said Lodge Grass Creek which was conveyed therefrom to said lands through such irrigation project.

5. That thereafter plaintiff herein, by fee simple patent, conveyed said allotted lands, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging to said Crow Indians, and to their heirs and assigns forever, the lands so conveyed to each of said Indians, being the same tracts of land as were so allotted to him or to her; that the said lands so allotted to Arthur Peters were so conveyed to him by patent dated February 18, 1918; that the said lands so allotted to Rosa Peters were so conveyed to her by patent dated October 28, 1919; that the said lands so allotted to George Peters were so conveyed to him by patent dated February 4, 1920; and that the said lands so allotted to Alice Peters were so conveyed to her by patent dated July 26, 1923.

6. That on March 21, 1922, the said Rosa Peters, and her husband, Oliver E. Peters, conveyed to the defendant Nickels Dethlefsen, by warranty deed, the aforesaid lands so allotted and patented to the said Rosa Peters, together with the tenements,

hereditaments and appurtenances thereunto belonging; that on April 10, 1922, the said Arthur Peters, and Grace Peters, his wife, conveyed to the defendant Mary Dethlefsen, by warranty deed, the aforesaid lands so allotted and patented to the said Arthur Peters, together with the tenements, hereditaments and appurtenances thereunto belonging; that on April 11, 1922, the said George Peters, and Martha Peters, his wife, conveyed to the defendant Mary Dethlefsen, by warranty deed, the aforesaid lands so allotted and patented to the said George Peters, together with the tenements, hereditaments and appurtenances thereunto belonging; that on October 26, 1928, the said Alice Peters Redfield, formerly [121] Alice Peters, and W. P. Redfield, her husband, conveyed to the defendant Nickels Dethlefsen, by warranty deed, the aforesaid lands so allotted and patented to the said Alice Peters, together with the tenements, hereditaments and appurtenances thereunto belonging; that ever since then these answering defendants have been, and now are, the owners of said tracts of land, together with all rights, privileges, immunities, appurtenances, water rights, tenements and hereditaments thereunto belonging; and that these answering defendants were, at the times said conveyances were so made to them, ever since have been, and now are, husband and wife.

7. That on or about May 1, 1922, these answering defendants conveyed water from said Lodge Grass Creek, through said irrigation project, to an additional 27 acres of land in the tracts of land last

described for the irrigation thereof, and ever since then they have continued to irrigate said additional 27 acres of land with waters so conveyed from said Lodge Grass Creek through said ditch and project to said lands.

8. That said irrigation ditch as so constructed by the predecessors in interest of these answering defendants, and so maintained by these answering defendants and their said predecessors in interest, was, at the time of its construction, ever since then has been, and now is, of such size and grade as to carry 91.6 miner's inches of water from said Lodge Grass Creek to, over and upon said 100 acres of irrigated land for the irrigation thereof.

9. That said lands so irrigated, and all thereof, need and require one-half of one miner's inch of water per acre delivered upon said irrigated land for the proper irrigation thereof; that said ditch is approximately two miles in length and that in conveying the necessary water for the irrigation of said tracts of land from Lodge Grass Creek to said irrigated tracts of land, there is a loss of water from seepage and evapora- [122] tion of approximately five miner's inches, because of which fact these answering defendants need and require and are entitled to an appropriation of fifty-five miner's inches of water at the point where said water is diverted from Lodge Grass Creek, for the proper irrigation of their said 100 acres of irrigated land.

10. That in or about the year 1922 these defendants changed the point of diversion of said water

from Lodge Grass Creek to a point approximately 1400 feet east and 660 feet north of the center line of said section twenty-four, which is now the point of diversion of said water for the irrigation of their said lands through their said irrigation ditch.

11. That by the construction of the ditch described herein, by the diversion of water from said Lodge Grass Creek by the predecessors in interest of these defendants, and by the use of the waters so diverted in the irrigation of the various tracts of land herein described by these answering defendants, and their predecessors in interest, the predecessors in interest of these defendants and these defendants appropriated and used fifty-five miner's inches of water of said Lodge Grass Creek upon the dates herein mentioned; that ever since then these defendants, and their predecessors in interest, have continually diverted and used that amount of water from said Lodge Grass Creek for the irrigation of said lands of these defendants; that by said diversion and use these defendants acquired a water right in said Lodge Grass Creek for 55 miner's inches of water as of the date of May 7, 1868, upon which date the Crow Indian treaty pleaded by plaintiff herein was made and entered into, and that these answering defendants, because of the foregoing facts, are entitled to the use of said 55 miner's inches of the waters of said Lodge Grass Creek and its tributaries to the same extent as the individual Indians herein mentioned, predecessors in interest of these answering defendants, would be

ntitled to under said Crow Indian treaty [123] of
Iay 7, 1868, if they had not conveyed said lands,
ogether with the tenements, hereditaments and ap-
urtenances thereunto belonging, to these answer-
ng defendants, and are equally entitled to the right
o use said 55 miner's inches of water as if they
vere members of the Crow tribe of Indians.

WHEREFORE, these answering defendants pray
hat plaintiff's bill of complaint be dismissed; that,
y judgment and decree of this court herein, these
nswering defendants be adjudged to be the owners
f and entitled to the use of 55 miner's inches of
he waters of said Lodge Grass Creek, and its tribu-
aries, as of the date of May 7, 1868; that these
nswering defendants are the owners of and entitled
o the right to use 55 miner's inches of the waters
f said Lodge Grass Creek, and its tributaries, to
he same extent that the said Rosa Peters, Alice
'eters, George Peters and Aliee Peters Redfield
vould now be entitled to if they had not conveyed
o these answering defendants the aforesaid lands,
ogether with all the rights, privileges, immunities,
ppurtenances, tenements and hereditaments there-
nto belonging; that these answering defendants are
he owners of and entitled to the right to use said
5 miner's inches of the waters of said Lodge Grass
'reek, and its tributaries, the same as though they
vere members of the Crow tribe of Indians and that,
y such judgment and decree of this court, these

answering defendants may have such other and further relief as in equity they are entitled to.

JOHNSTON, COLEMAN & JAMESON
By W. M. JOHNSTON
Attorneys for the defendants Nickels Dethlefsen and Mary Dethlefsen.

State of Montana,
County of Yellowstone—ss.

W. M. JOHNSTON, being first duly sworn, deposes and says: [124]

That he is one of the attorneys for the defendants Nickels Dethlefsen and Mary Dethlefsen in the above entitled cause; that he makes this verification for and on behalf of said defendants for the reason that neither of said defendants is now in Yellowstone County, Montana, where affiant resides and makes this affidavit; that he has read the foregoing answer of said defendants to the bill of complaint herein, and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. M. JOHNSTON.

Subscribed and sworn to before me this 9th day of October, 1934.

[Seal] HOWARD W. HANSON,
Notary Public for the State of Montana, residing at Billings.

My commission expires May 20, 1936.

Service of the foregoing Joint and Several Answers of Nickels Dethlefsen and Mary Dethlefsen to the Bill of Complaint, and receipt of copy of same, acknowledged this 9th day of October, 1934.

KENNETH R. L. SIMMONS,
Of counsel for Plaintiff.
BURKE & COLLINS, and
BENJ. P. HARWOOD,
By E. E. COLLINS,

As Attorneys for the defendants M. H. Tschirgi, Berth Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller.

[Endorsed]: Filed Oct. 10, 1934. [125]

Thereafter, on October 10th, 1934, the Motion of defendants Dethlefsen, to make other parties defendants, was duly filed herein, in the words and figures following, to-wit: [126]

[Title of Court and Cause.]

NOTICE OF MOTION TO MAKE OTHER PARTIES DEFENDANTS HEREIN.

To the above named Plaintiff, and to JAMES H. BALDWIN, Esq., R. LEWIS BROWN, Esq., ROY F. ALLAN, Esq., DONALD J. STOCKING, Esq., and KENNETH R. L. SIMMONS, Esq., Attorneys and Counsellors for said Plaintiff:

YOU WILL TAKE NOTICE That at ten o'clock

Yellowstone County, Montana, on the opening day of the next term of court at that place, or as soon thereafter as counsel may be heard, the attorneys for the defendants Nickels Dethlefsen and Mary Dethlefsen will move the above entitled court for an order requiring plaintiff and its attorneys to amend its complaint herein by making the following named persons parties defendant herein: E. F. Jensen, Barney LaDow, W. H. Spear, Red Gap Ranch, Inc., Bozeman Trail Ditch Company, Ford E. Hovey and Matt H. Tschirgi, as executors of the last will of Frank M. Heinrich, deceased; ..... Gilbert, Drake-Ballard Co., Daniel Sullivan, O. T. Souder, Daisy Spear, Estate of W. M. Spear, deceased, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bars Cattle Company.

Said motion will be based upon the pleadings herein and the affidavit of W. M. Johnston hereunto annexed, and upon oral testimony which may be offered in support of said motion at the hearing thereon. [127]

Attached hereto is a copy of the motion that will be made by counsel for said named defendants at the time and place stated in this notice.

JOHNSTON, COLEMAN & JAMESON
By W. M. JOHNSTON,
Attorneys for the defendants Nickels Dethlefsen and Mary Dethlefsen.

Service of the foregoing Notice of Motion, and attached motion and affidavit, and receipt of copies of same, admitted October 9th, 1934.

KENNETH R. L. SIMMONS,
One of the attorneys for Plaintiff.

Attorneys for the defendants.
BURKE & COLLINS, and
BENJ. P. HARWOOD,
By E. E. COLLINS,

Attorneys for the defendants M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller.

[Endorsed]: Filed Oct. 10, 1934. [128]

[Title of Court and Cause.]

MOTION TO MAKE OTHER PARTIES DEFENDANTS HEREIN.

Come now the above named defendants Nickels Dethlefsen and Mary Dethlefsen and move the court to require plaintiff to amend its complaint herein by making the following named persons defendants herein: E. F. Jensen, Barney LaDow, W. H. Spear, Red Gap Ranch, Inc., Bozeman Trail Ditch Company, Ford E. Hovey and Matt H. Tschirgi, as executors of the last will of Frank M. Heinrich, de-

Sullivan, O. T. Souder, Daisy Spear, Estate of W. M. Spear, deceased, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bars Cattle Company.

Said motion is made for the reason that each and all of the parties named herein divert water from Little Big Horn River, Lodge Grass Creek, and their tributaries for the purpose of irrigating lands occupied and controlled by them within the present boundaries of the Crow Indian reservation in Montana.

This being a suit in equity all parties claiming any interest in the waters of said streams should be made parties [129] so that the court may be fully advised as to the rights of each and all parties claiming any right to use the waters of any of said streams. By its decree this court should determine the rights of each and every person and corporation to the use of the waters of said river, creek or their tributaries. No user of the waters from said river, creek or tributaries, who is entitled to such use, should be enjoined from diverting water therefrom so long as plaintiff, the Crow tribe of Indians, and all members of the Crow tribe of Indians can obtain the water from said river, creek or tributaries to which they are entitled. Without such persons and corporations being made parties defendant herein a complete and full adjudication of the rights of plaintiff and these defendants cannot be made, for the reason that the persons and

corporations named in this motion may be unlawfully diverting water from said river, creek and their tributaries in such quantities that, if enjoined from so doing, plaintiff, said tribe and said Indians would have all the water from said streams to which they are entitled, without interfering with the rights of these defendants to the use of the waters of Lodge Grass Creek.

This motion is based upon the pleadings herein, the affidavit of W. M. Johnston hereunto annexed, and upon oral testimony which may be offered in its support at the hearing thereon.

JOHNSTON, COLEMAN & JAMESON
By W. M. JOHNSTON
Attorneys for the defendants Nickels Dethlefsen and Mary Dethlefsen.

[Endorsed]: Filed Oct. 10, 1934. [130]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO MAKE OTHER PARTIES DEFENDANTS HEREIN.

State of Montana,
County of Yellowstone—ss.

W. M. JOHNSTON, being first duly sworn, deposes and says:

That he is one of the attorneys for the defend-

ants Nickels Dethlefsen and Mary Dethlefsen in the above entitled cause; that he is informed and believes and therefore states the fact to be that E. F. Jensen, Barney LaDow, W. H. Spear, Red Gap Ranch, Inc., Bozeman Trail Ditch Company; Ford E. Hovey and Matt H. Tschirgi, as executors of the last will of Frank M. Heinrich, deceased; ..... Gilbert, Drake-Ballard Co., Daniel Sullivan, O. T. Souder, Daisy Spear, Estate of W. M. Spear, deceased, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bars Cattle Company now divert, and for many years last past have diverted, water from Little Big Horn River, Lodge Grass Creek, and their tributaries at various points on the present Crow Indian reservation for the irrigation of lands occupied and controlled by them WITHIN the present boundaries of the Crow Indian reservation in Montana; that if any one of said parties named herein has a right to use any of such waters, some of them at least are subsequent in time and subordinate in right to the rights of the defendants Nickels Dethlefsen and Mary Dethlefsen in and to said waters, and [131] that at least some of said parties divert said waters and use the same for the irrigation of lands which are not entitled to any water for the irrigation thereof.

W. M. JOHNSTON

Subscribed and sworn to before me this 5th day of October, 1934.

[Seal] HOWARD W. HANSON
Notary Public for the state of Montana, residing at Billings.

My Commission expires May 20, 1936.

[Endorsed]: Filed October 10, 1934. [132]

Thereafter, on October 25, 1934, the Plaintiff's Reply to the Joint and Several Answers of defendants Dethlefsen, was duly filed herein, in the words and figures following, to-wit: [133]

[Title of Court and Cause.]

REPLY TO JOINT AND SEVERAL ANSWERS OF NICKELS DETHLEFSEN AND MARY DETHLEFSEN.

Comes now the plaintiff above named and for its reply to the joint and several answers of Nickels Dethlefsen and Mary Dethlefsen and to the affirmative defense and counter claims and cross bills set out in said answers, and admits, denies and alleges as follows, to-wit:

I.

Plaintiff denies all the matters, things and allegations set out and contained in the further defense of said defendants Nickels Dethlefsen and Mary Dethlefsen, and contained and set out in Para-

II.

Replying to the first counter claim and cross bill of the said defendants contained in said answers, the plaintiff admits the allegations set out and contained in Paragraphs I and II of the first counter claim and cross bill of said defendants.

III.

The plaintiff admits that either the predecessors in interest of said answering defendants, or the said answering defendants constructed an irrigation ditch tapping Lodge Grass Creek at sometime prior [134] to the commencement of this action; denies that it has any knowledge or information as to whether or not such ditch was constructed on the 1st of May, 1893, and alleges that it has no knowledge as to the exact date of the construction of said ditch, except that the same was constructed prior to the commencement of this action; admits that since the construction of said ditch, the predecessors in interest of the said defendants and the defendants nave conveyed the waters of Lodge Grass Creek through said ditch over and upon the lands described in Paragraph I of the first counter claim or some portion of the said land, and have irrigated the said lands or a portion of the same with the water so conveyed through the said ditch, and that they are continuing to conduct water through said ditch from said creek for the irrigation of said lands.

IV.

Denies that it has any knowledge or information as to the size or grade of said ditch so constructed, or as to whether or not it carries the amount of 91.6 miner's inches of water from said Lodge Grass Creek over and upon one hundred acres of irrigated land and alleges that it does not know and is not informed as to the number of miner's inches of water carried by the said ditch or the exact number of acres of land irrigated with said water.

V.

Admits that the said ditch is approximately two miles in length and that in conveying water through the same there is a loss of water from seepage evaporation; denies that it has any knowledge or information as to whether or not the loss is approximately 5 miner's inches and denies that the defendants are entitled to an appropriation of 55 miner's inches of water at the point where the same is diverted from Lodge Grass Creek, or any appropriation whatsoever of any amount of water from any point of diversion from Lodge Grass Creek for the purpose of irrigating one hundred acres of their said land, or any number of acres of their said land, or irrigating their said land at all. [135]

VI.

Denies that it has any knowledge as to whether or not defendants changed the point of diversion of

VII.

Denies that by the construction of the said ditch described in the first counter claim and cross bill of the defendants' answers, or by the diversion of waters from Lodge Grass Creek by the predecessors in interest of the defendants or by the defendants, or by the use of the waters so diverted in the irrigation of the land described by the said defendants in their said counter claim and cross bill, that the said predecessors in interest of the defendants, or the defendants obtained any valid appropriation of or appropriated 55 miner's inches of the waters of said Lodge Grass Creek, or any amount of inches of said waters, or any of the waters of Lodge Grass Creek upon the date mentioned in said answers, or upon any other date, or at all; admits that the defendants and their predecessors in interest have diverted and used water from Lodge Grass Creek for the irrigation of their said lands and denies by said diversion and use the defendants acquired a water right to the said Lodge Grass Creek for 40 miner's inches of water as of the date of May 1 1893, or acquired any water right by such diversion and use in Lodge Grass Creek, of any number of miner's inches whatsoever, or at all, or acquired any water right whatsoever in Lodge Grass Creek as of the date of May 1, 1893, or as of any other date or time, or at all, and denies that the said defendants acquired any water right of 15 inches of water, or of any amount of water whatsoever of the waters of Lodge Grass Creek

1922, or as of any other date or time, whatsoever, at all.

VIII.

Admits that from sometime prior to the commencement of this action the defendants diverted d used water from Lodge Grass Creek during ch irrigation season. [136]

IX.

Denies that it has any knowledge or information to the matters and allegations set out and conned in Paragraph X of the said counter claim d cross bill of said answers.

X.

Denies all of the matters, allegations and things out and contained in Paragraph XI of the said st counter claim and cross bill contained in dedants' answer.

XI.

Admits matters and facts set out and contained Paragraph I of the second counter claim and oss bill of the said defendants.

XII.

Denies that it has any knowledge or information to when, if at all, the said Rosa Peters selected her allotment of lands on the Crow Indian Resvation the lands described in Paragraph II of d second counter claim and cross bill; and de-

whether or not Oliver E. Peters selected as the allotment of lands in the Crow Indian Reservation for said minors, the lands described as having been selected for each of the said minor children in said Paragraph II of said second counter claim and cross bill at the time set out in said Paragraph or at all.

XIII.

Denies that it has any knowledge or information that on or about May 1, 1893, or at any other time, the said Rosa Peters for herself and the said Oliver E. Peters, acting for their said minor children, constructed an irrigation ditch tapping Lodge Grass Creek at any point whatsoever through which they conveyed water from Lodge Grass Creek to, over and upon approximately seventy-three acres, or any number of acres whatsoever of the land described in Paragraph III of the said second counter claim and cross bill; admits that sometime prior to the commencement of this action the answering defendants have conveyed water from Lodge Grass Creek through a ditch constructed to and upon the lands described in Paragraph III of said second counter claim and cross bill and have irrigated said lands or a portion of the same and are continuing to conduct wafer through the said ditch from [137] Lodge Grass Creek for the irrigation of said lands.

XIV.

Admits that between the years 1901 and 1907, one John K. Rankin, an allotting agent, allotted to Rosa Peters, Arthur Peters, George Peters and

Alice Peters the lands described in Paragraph II of the second counter claim and cross bill; denies that it has any knowledge or information as to whether at the time of the said allotments, seventy-three acres of said land or any amount of said land whatsoever was irrigated by said Oliver E. Peters, father of said minor Crow Indian; denies that said lands, or any part thereof, are under an irrigation project or were irrigable; and denies that it has any knowledge as to whether the same or any part thereof were being irrigated with water from Lodge Grass Creek, conveyed to said lands through any irrigation project.

XV.

Admits that the plaintiff, by patent, conveyed the lands allotted to Arthur Peters February 18, 1918, to Rosa Peters by patent dated October 18, 1919, to George Peters by patent dated February 4, 1920 and to Alice Peters by patent dated July 26, 1923.

XVI.

Admits that on March 21, 1922, Rosa Peters and her husband, Oliver E. Peters, conveyed by deed to the defendant Nickels Dethlefsen the land patented to Rosa Peters; admits that Arthur Peters and Grace Peters, his wife, conveyed to the defendant Mary Dethlefsen, by deed dated April 10, 1922, the land patented to the said Arthur Peters; admits that by deed dated April 11, 1922, George Peters and Martha Peters, his wife, conveyed to the defendant Mary Dethlefsen, the lands patented to the said George Peters; admits that by deed dated Octo-

ber 26, 1928, Alice Peters Redfield, formerly Alice Peters, and W. P. Redfield, her husband, conveyed to the defendant Nickels Dethiefsen the land so patented to the said Alice Peters; admits that said defendants ever since have been and now are the owners of said tracts of land, and that the answering defendants were at the times of said conveyances ever since have been and now are husband and wife. [138]

XVII.

Denies that it has any knowledge or information as to the matters and allegations set out and contained in Paragraphs VII and VIII of the second counter claim and cross bill.

XVIII.

Admits that the ditch used by the defendants in conveying water from Lodge Grass Creek to their said lands described in their second counter claim and cross bill is approximately two miles in length and that in conveying the water used by them for the irrigation of said tracts of land from Lodge Grass Creek there is a loss of water from seepage and evaporation, the exact amount of such loss of water being unknown to the plaintiff; denies that the defendants are entitled to an appropriation of 55 miner's inches of water at the point from where said water is diverted from Lodge Grass Creek, or at any point or any amount of inches of water whatsoever or at all for the irrigation of 100 acres of their said land or for the irrigation of any of said land whatsoever.

XIX.

Denies that it has any knowledge as to the matters and allegations set out and contained in Paragraph X of the said second counter claim and cross bill.

XX.

Denies that by the construction of the ditch described in defendants' second counter claim and cross bill, or by any construction of any ditch whatsoever from Lodge Grass Creek to their said lands or by the diversion of water from Lodge Grass Creek by the predecessors in interest of the defendants, or by the defendants, and by the use of waters so diverted in the irrigation of the various tracts of lands described by the answering defendants in their said counter claim and cross bill, that the said predecessors in interest of the defendants or the defendants appropriated 55 miner's inches of the water of Lodge Grass Creek, or any amount of miner's inches of water from Lodge Grass Creek upon the dates mentioned or upon any other dates or at all; admits that from sometime prior to the commencement of this action defendants have continuously diverted and used water from Lodge Grass Creek for the irrigation of their said lands; denies that it has [139] any knowledge of the amount of water so used; denies that by the said diversion and use of such waters the defendants acquired a water right in Lodge Grass Creek for 55 miner's inches of water or for any sum or amount of miner's inches of water whatsoever, or acquired any water right whatsoever as of the date of May 7,

1868, or at any other time or date whatsoever; and denies that the defendants, because of such facts or any facts whatsoever, are entitled to the use of 55 miner's inches of water of Lodge Grass Creek and its tributaries, or are entitled to the use of any sum or amount of water whatsoever or any water from Lodge Grass Creek and its tributaries to any extent whatsoever under the Crow Indian Treaty of May 7, 1868, or under any treaty whatsoever made with the Crow Indians by the United States; and denies that they are equally entitled to the right to the use of 55 miner's inches of water or any amount of miner's inches of water whatsoever as if they were members of the Crow Tribe of Indian, and in this connection the plaintiff alleges that the defendants are not members of the Crow Tribe of Indians and are not Indians.

XXI.

The plaintiff denies generally each and every allegation, matter and thing contained in the first counter claim and cross bill of complaint and the second counter claim and cross bill of complaint not herein specifically admitted, qualified or denied.

XXII.

Replying to the said answers as a whole and to each and every allegation of new matter and to each and every affirmative allegation therein contained the plaintiff denies generally each and all and every of such affirmative allegations or allegations of new matter not herein specifically admitted, qualified or denied.

WHEREFORE, the plaintiff having fully replied to the joint and several answers of the said defendants Nickels Dethlefsen and Mary Dethlefsen, renews the prayer for the relief fully set out and contained in the plaintiff's complaint against the said defendants on file herein. [140]

(Sgd.) JAMES H. BALDWIN
United States Attorney for the
District of Montana
(Sgd.) R. LEWIS BROWN
Assistant United States Attorney
for the District of Montana

Kenneth R. L. Simmons

United States of America,
District of Montana.—ss.

R. LEWIS BROWN, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such, makes this verification to the foregoing reply; that he has read the same and knows the contents thereof and that the same is true to the best of his own knowledge, information and belief.

(Sgd.) R. LEWIS BROWN

Subscribed and sworn to before me this 25th day of October, 1934.

[Seal] C. G. KEGEL
Deputy Clerk,
U. S. District Court, District of Montana.

[Endorsed]: Filed Oct. 25, 1934. [141]

Thereafter, on October 25, 1934, the Plaintiff's Reply to the Joint and Separate Answer of defendants Yates, was filed herein, in the words and figures following, to-wit: [142]

[Title of Court and Cause.]

REPLY TO THE JOINT AND SEPARATE ANSWER OF F. L. YATES AND EMMA E. YATES.

Comes now the plaintiff above named and for its reply to the joint and separate answer of F. L. Yates and Emma E. Yates, defendants herein and to the affirmative defenses, counter claims and cross bills set out in said answer, and admits, denies and alleges as follows, to-wit:

I.

Plaintiff denies all the matters, things and allegations set out and contained in the further defense of the said defendants F. L. Yates and Emma E. Yates set out and contained in Paragraph XXIV of their joint and separate answer.

II.

Plaintiff denies that it has any knowledge or information as to whether approximately sixty-two acres of the land described in Paragraph I, or any part or portion thereof, of the first counter claim and cross bill of complaint can be and for many years last past has been irrigated with water diverted from Lodge Grass Creek and admits the other allegations contained in Paragraph I of the said first counter claim and cross bill of the complaint. [143]

III.

Admits the allegations contained in Paragraph 2 of said cross bill and first counter claim.

IV.

Plaintiff admits that at sometime prior to the commencement of this action the answering defendants constructed an irrigation ditch tapping Lodge Grass Creek, through which ditch they conveyed water and continued to convey water from Lodge Grass Creek to and upon their said lands for irrigation and other purposes; denies that it has any knowledge as to whether or not the said ditch was constructed on the 18th day of September, 1928, or as to the amount of acreage irrigated by the water of Lodge Grass Creek conveyed through said ditch.

V.

Admits that at sometime prior to the commencement of this action the answering defendants constructed an irrigation ditch tapping Percheron Creek, a tributary of Lodge Grass Creek, through which ditch the said defendants conveyed and continued to convey water to, over and upon their said land, or a portion thereof and have used the same for the irrigation of their said lands; denies that it has any knowledge as to whether or not such ditch was constructed on the 26th day of September, 1928; denies that it has any knowledge as to the number of acres of their said land so irrigated by such waters conveyed through the said ditch.

VI.

Denies that it has any knowledge as to the size, grade or carrying capacity of the said ditches so constructed by said defendants.

VII.

Denies that it has any knowledge as to the amount of water needed or required by said defendants for the irrigation of their said lands.

VIII.

Denies that by the construction of the said ditches or by the diversion of water from Lodge Grass Creek and its tributaries and by the use of the water so diverted in the irrigation of the lands owned by the defendants and described by them in their said first counter claim and [144] cross bill of complaint, that the said answering defendants appropriated 28 miner's inches of water from Percheron Creek and 5 miner's inches from Lodge Grass Creek or any sum or amount of inches of water or any water whatsoever from said creeks or either of them upon the dates mentioned in their said counter claim and cross bill of complaint or at any other date or at all; admits that from sometime prior to the commencement of this action the defendants have continually diverted and used water from Lodge Grass Creek and Percheron Creek for the irrigation of their said land and for stock and domestic purposes, and denies that by said diversion and/or use of said waters the defendants acquired a water right in Percheron Creek or Lodge

Grass Creek or either of the said creeks or the said amount of water used by them or for any amount of water whatsoever, or acquired any water right whatsoever from either or both of said creeks on the dates mentioned or upon any other dates, or at all.

IX.

Admits that since the first use of said water of said Lodge Grass Creek and Percheron Creek by the defendants, they have diverted and used the water of said creeks during each irrigation season, and denies that it has any knowledge as to whether such use was without interruption during such irrigation season or any of them.

X.

Denies the allegations, matters and things set out and contained in Paragraphs 9 and 10 of said first counter claim and cross bill of complaint.

XI.

Admits the allegations set out and contained in Paragraphs 1 and 2 of the second counter claim and cross bill of complaint.

XII.

Admits that on or about the 18th day of September, 1928, the said Emma Eames Yates filed in the office of the County Clerk and Recorder of Big Horn County, Montana, a Notice of Appropriation, a copy of which is attached to the answer, marked Exhibit "A", and which said Notice was recorded in Book Six of Miscellaneous Records at page 294

thereof; denies that thereby or at all or by the filing or recording of the said [145] Notice of Appropriation or at all the said defendants appropriated 50 miner's inches of the waters of Lodge Grass or any sum or amount of miner's inches of the water of said creek or any of the water of said creek for irrigation and domestic purposes or for any purposes whatsoever or at all.

XIII.

Admits that on or about the 28th day of September, 1928, the said Emma Eames Yates filed in the office of the County Clerk and Recorder of Big Horn County, Montana, a Notice of Appropriation, a copy of which is attached as Exhibit "B" to her said answer, which said Notice was filed and recorded in Book Six of Miscellaneous Records on page 296 of said office, and denies that she thereby or at all appropriated 200 miner's inches of the waters of Percheron Creek or any sum or amount of miner's inches whatsoever of the waters of said creek or any of the water of said creek for irrigation and other purposes or for any purpose or purposes whatsoever.

XIV.

Admits that since sometime prior to the commencement of this action, the exact date being unknown to this plaintiff, the defendants have conveyed waters from Lodge Grass Creek and Percheron Creek through ditches constructed by them to, over and upon their said lands; admits that they are the owners of said tracts of land and that they

were, have continued to be and now are husband and wife.

XV.

Denies that it has any knowledge, or information as to the size, grade or carrying capacity of the said ditches or either of them.

XVI.

Admits that since the first use of the said waters of Lodge Grass Creek and Percheron Creek by the defendants they have diverted and used the waters of said creeks during each irrigation season; denies that it has any knowledge as to whether such use was without interruption; admits that the said lands are arid and denies the other allegations contained in Paragraph 7 of the said second counter claim and cross bill. [146]

XVII.

Denies that the defendants acquired any water right or any title to said water or the right to use any of the water of Lodge Grass Creek, Little Big Horn River or their tributaries under and by virtue of the treaty entered into between the United States of America and the Crow Tribe of Indians on May 7, 1868 or any other treaty entered into at any time between the United States and said Crow Tribe of Indians; denies that the said defendants acquired any right to said water or to the use of the same by virtue of any statute of the United States of America, or by any conveyance from any individual member of the Crow Tribe of Indians or acquired any right in said water or the right to

use the same in any manner or at all, and alleges that neither of the said defendants are Indians or members of the Crow Tribe of Indians.

XVIII.

Plaintiff denies generally each and every matter, thing and allegation set out and contained in the affirmative defense and the first and second counter claim and cross bill of said answer not herein specifically admitted, qualified or denied.

XIX.

The plaintiff, replying to the said answer as a whole and to each and every affirmative allegation and allegation of new matter therein, denies generally each and every and all of such allegations of affirmative nature and such allegations of new matter not herein specifically admitted, qualified or denied.

WHEREFORE, plaintiff having fully replied to said joint and separate answer of the said answering defendants, renews the prayer for the relief herein specifically set out and contained in the complaint on file herein.

JAMES H. BALDWIN
United States Attorney for the
District of Montana
R. LEWIS BROWN
Assistant United States Attorney
for the District of Montana

Kenneth R. L. Simmons
District Counsel [147]

United States of America,
District of Montana.—ss.

R. LEWIS BROWN, being first duly sworn on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such, makes this verification to the foregoing reply; that he has read the same and knows the contents thereof and that the same is true to the best of his own knowledge, information and belief.

R. LEWIS BROWN

Subscribed and sworn to before me this 25th day of October, 1934.

[Seal] C. G. KEGEL,
Deputy Clerk,
U. S. District Court, District of Montana

[Endorsed]: Filed Oct. 25, 1934. [148]

Thereafter, on October 25, 1934,

PLAINTIFF'S REPLY TO THE JOINT AND SEVERAL ANSWERS OF DEFENDANTS M. H. TSCHIRGI, ET AL,

was duly filed herein, in the words and figures following, towit:

[Title of Court and Cause.]

COMES NOW the plaintiff and for reply to the further answer and affirmative defense of the answering defendants, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in paragraphs 1 and 2 of said further answer and affirmative defense.

II.

Denies that it has any knowledge of whether the lands allotted to the persons named in paragraphs 1 and 2 of the further answer and affirmative defense were irrigable lands or were located under a ditch proposed and surveyed by the United States Indian Irrigation Service or designated by said Service as Upper Little Horn Ditch Number 1.

[150]

III.

Denies that when the said lands were so allotted to said members of the Crow Tribe of Indians named in paragraphs 1 and 2 of the further answer and affirmative defense, that the use of the waters of the streams of the Crow Indian Reservation and the waters of the Little Big Horn River and its tributaries were reserved to each individual Indian named in said paragraph of said answer and defense in irrigating the land so allotted to each of them and for any other beneficial purpose and deny that the right to said waters became appurtenant to the lands so allotted to each Indian.

IV.

Admits the allegations of paragraphs 5 and 6 of said further answer and affirmative *offense*.

V.

Denies that it has any knowledge or information as to whether or not a portion of the lands so allotted as described in paragraph 6 of said further answer, were irrigable lands or were located under a ditch proposed and surveyed by the United States Indian Irrigation Service and designated by said Service as Upper Little Horn Ditch Number 1.

VI.

Denies when the said lands were so allotted to said members of the Crow Tribe of Indians, the use of the waters of the streams of the Crow Indian Reservation, the waters of the Little Big Horn River and its tributaries were reserved to each individual Indian named in paragraph 5 of the said affirmative defense for the use of said Indians in irrigating the lands so allotted to each of them or for any other beneficial purpose, and deny that thereupon or at all, each of said Indian allottees was vested with the right incident to ownership of the said waters, and deny that the right to said waters became appurtenant to the lands so allotted to each said Indian. [151]

VII.

Admits that each of the Indian allottees described in paragraphs 1 and 5 of the affirmative defense, died; denies that any waters became vested in the said Indians or any of them before their said deaths; admits that the lands described in paragraphs 2 and 6 were sold by the plaintiff at public sales and in this connection alleges that said lands

were sold as non-irrigable lands; admits that at such sales the predecessors in interest of the defendant Antler Land Company, a Montana corporation, purchased the said lands; admits that thereafter the plaintiff issued and delivered to such predecessors in interest of said defendant Antler Land Company, a Montana corporation, patents in fee conveying the lands so sold.

VIII.

Denies that it has any knowledge or information as to when purchasers of the said land, predecessors in interest of the Antler Land Company, a Montana corporation, proceeded to place any of the lands so purchased under irrigation; denies that it has any knowledge as to whether the said lands or any of them were within the boundaries of Upper Little Horn Ditch Number 1, or that said ditch was proposed and surveyed by the United States Indian Irrigation Service; denies that it has any knowledge or information as to whether said predecessors in interest of said Antler Land Company, a Montana corporation, were advised that there were any lands capable of being irrigated or were within the area to be irrigated by the United States Indian Irrigation Service ditch which they designated as Upper Little Horn Ditch Number 1; admits that the predecessors in interest of the Antler Land Company, a Montana corporation, were advised that they should not and must not attempt to irrigate any of the lands so purchased; denies that it has any knowledge as to whether or not the defendant was advised that the United States Indian Irriga-

tion Service had surveyed and intended to construct Upper Little Horn Ditch Number 1, and that the same would irrigate all or any part of the lands described in paragraphs 2 and 5 of the said affirmative defense. [152] Denies that the said predecessors in interest of the Antler Land Company, a Montana corporation, relied upon any statement claimed to have been made by the plaintiff or any promises claimed to have been made by the plaintiff. Denies that it has any knowledge as to when, if ever, the predecessors in interest of the Antler Land Company, a Montana corporation, had any surveys made; denies that it has any knowledge as to when said predecessors in interest of the Antler Land Company, a Montana corporation, took steps necessarily incident to placing the land under irrigation.

IX.

Admits that at some time prior to the commencement of this action, either the Antler Land Company, a Montana corporation, or its predecessors in interest, constructed an irrigation ditch tapping the Little Big Horn River; denies that it has any knowledge or information as to whether said ditch was constructed on August 31, 1915, and admits that by and through said ditch it conveyed water from the Little Big Horn River to over and upon approximately 537.4 acres of land, being a part of the lands described in paragraphs 2 and 6, and 11 of said affirmative defense; admits that the defendant Antler Land Company, a Montana corporation, has conveyed water from said Little Big Horn River through the said ditch and ditches so con-

structed upon said lands and have irrigated said lands with the waters so conveyed through said ditches.

X.

Denies that it has any knowledge or information as to the amount of water required per acre for the irrigation of said lands; denies that the Antler Land Company, a Montana corporation, is entitled to an appropriation of 298.7 miner's inches of water or any other sum or amount of inches of water at the point where the water is diverted from the Little Big Horn River or at any other point of diversion from the waters of said Crow Indian Reservation for the irrigation of said land, or at all, and denies all the other allegations, matters and things contained in paragraph 12 of said affirmative [153] defense.

XI.

Admits that by the construction of the ditch referred to in the said affirmative defense, the said Antler Land Company, a Montana corporation, and its predecessors in interest diverted waters from the Little Big Horn River and used the same for irrigation purposes. Admits the predecessors in interest of the Antler Land Company, a Montana corporation, and the Antler Land Company, a Montana corporation, have used the waters of the Little Big Horn River for irrigation purposes upon their said lands; denies that it has any knowledge as to whether or not it used 298.7 miner's inches of water, and alleges that it does not know and is not informed as to the exact amount of inches of water

used; denies that by the diversion of said waters the use of said waters and because of the purase of said lands the defendant acquired a vested ght in waters of the Little Big Horn River or any ght whatsoever in the waters of said river for 8.7 miner's inches of water as of the date of ay 7, 1868, or any amount or sum of inches of ater whatsoever as of said date or as of any other te.

XII.

Admits that the Antler Land Company, a Montna corporation, is the owner of the legal title to e lands described in paragraphs 2 and 6 of the irmative defense by conveyance from the original tentees, but denies that by such conveyance to the iginal patentees or by any conveyance to the ntler Land Company, a Montana corporation, it came or is now, the owner of any water or any ter right or rights claimed in its said affirmative fense, and denies that by virtue of its ownership the said land, or otherwise, it ever had or now s, the right to use any of the waters of the Little g Horn River or its tributaries or any of the ters of the said reservation for the irrigation of y of its lands described in its said affirmative swer, [154] and lying within the confines of the ow Indian Reservation as diminished.

XIII.

Admits the allegations contained in paragraphs and 16 of the said further answer and affirmative fense.

XIV.

Denies that it has any knowledge as to whether a portion of the lands so allotted were irrigable lands capable of being irrigated from the waters of the Little Big Horn River and its tributaries or were allotted under a ditch proposed and surveyed by the United States Indian Irrigation Service and designated by said Service as Upper Little Horn Ditch Number 1.

XV.

Denies that when the lands were so allotted to such member of the Crow Tribe of Indians named in paragraphs 15 and 16 of said further answer, that the use of the waters of the streams of the Crow Indian Reservation or the waters of the Little Big Horn River or its tributaries were reserved to each individual Indian named in said paragraphs in any amount whatsoever and for any purpose whatsoever, beneficial or otherwise, or for irrigation purposes, and denies that thereupon, or at all, each of said Indian allottees was vested with the rights incident to the ownership of said waters or any rights to said waters; denies that the said waters or any waters became appurtenant to the lands so allotted to each said Indian.

XVI.

Denies that any waters reserved or otherwise became vested in the said Indians before the death of each of them; admits that after the said lands

were allotted, each and all of the allottees died; admits that the lands described in [155] paragraph 16 of the said further answer were sold by the plaintiff at public sale to the predecessors in interest of Mrs. Barney Ladow, and in this connection alleges that said lands were sold as non-irrigable lands; admits that patents in fee conveying the said land were issued to said predecessors in interest of the said Mrs. Barney Ladow.

XVII.

Admits that after the issuance and delivery of the patents so purchased, either the said predecessors in interest of Mrs. Barney Ladow or Mrs. Barney Ladow, after the issuance and delivery of the patents to such lands, proceeded to place said lands under irrigation; denies that it has any knowledge, or information as to whether or not the lands described in paragraph 16 of the said affirmative defense lie under the Upper Little Horn Ditch Number 1; denies that it has any knowledge as to whether the ditch was proposed and surveyed by the United States Indian Irrigation Service; denies that it has any knowledge or information as to whether the predecessors in interest of Mrs. Barney Ladow were advised that said lands were within the area to be irrigated by the United States Indian Irrigation Service which they designated as Upper Little Horn Ditch Number 1; admits that the predecessors in interest of Mrs. Barney Ladow were advised by plaintiff that they should not, and must

not attempt to irrigate any of the lands so purchased by them; denies that it has any knowledge as to whether or not the said predecessors in interest of Mrs. Barney Ladow were advised that the United States Indian Irrigation Service had surveyed and intended to construct Upper Little Horn Ditch Number 1, which would irrigate all the lands described in paragraph 16 of the said affirmative defense; denies that the predecessors in interest of Mrs. Barney Ladow relied upon any statements or promises made by the plaintiff; denies that it has any knowledge as to whether or not the predecessors in interest of the said Mrs. Barney Ladow had surveys made with reasonable diligence or at all, or when any steps were taken [156] necessary and incident to placing the said lands under irrigation but admits that such steps were taken, and allege that the same were taken prior to the commencement of the action herein.

XVIII.

Admits that either the predecessors in interest of Mrs. Barney Ladow or Mrs. Barney Ladow constructed an irrigation ditch tapping the Little Big Horn River and that water was conveyed through said ditch from the Little Big Horn River to over and upon the lands described in paragraph 16 of the affirmative defense and that they have conveyed

the said water from the Little Big Horn River through said ditch to and upon the said described lands, and have irrigated the said lands with the water so conveyed through said ditch; denies that it has any knowledge as to whether or not the said ditch was constructed on August 31, 1915, and what time prior to the commencement of the action, the same was constructed; denies that it has any knowledge as to whether or not 158.6 acres of land were so irrigated or that it has any knowledge as to the exact amount of the acres so irrigated, but alleges that some of the lands, the exact amount being unknown to the plaintiff were irrigated by said water.

XIX.

Admits that the said ditch is approximately one mile in length before reaching the land of Mrs. Barney Ladow; admits there is a loss from seepage and evaporation; denies that it has any knowledge as to whether the loss is approximately five miner's inches of water or that the said lands require five miner's inches of water for irrigation; denies that Mrs. Barney Ladow is entitled to an appropriation of 84.3 miner's inches of water or an appropriation of any amount of water whatsoever, or at all, at the point where the said water is diverted from the Little Big Horn River, or at any point on the Little Big Horn River or from any of the waters from the Crow Indian Reservation for the [157] purpose of irrigating 158.6 acres of her said land, or any amount of acreage of her said land whatsoever.

XX.

Denies that by the construction of the said ditch herein referred to, or by the placing of said lands under irrigation and by the diversion of water from the said Little Big Horn River or by the use of the said water in the irrigation of the various tracts of land owned by the said Mrs. Barney Ladow by either herself, her agents, or her predecessors in interest; that the said predecessors in interest of Mrs. Barney Ladow, or she, or her agents, obtained any valid appropriation of 84.3 miner's inches of water of the Little Big Horn River or any amount of said waters at all, and denies that by said diversion and use, or because of the purchase of the said land, Mrs. Barney Ladow or her predecessors in interest acquired a vested water right or any water right whatsoever in the said Little Big Horn River for 84.3 inches of water, or any amount of water whatsoever, or at all, as of the date of May 7, 1868, or of any other date or time whatsoever, or at all, and denies that Mrs. Barney Ladow or her predecessors in interest purchased the right of any Indian allottee to the use of said waters.

XXI.

Admits by mense conveyances, Mrs. Barney Ladow is the owner of the land described in paragraph 16 of the said affirmative defense; denies that by such purchase of said land or otherwise, or at all, she ever became or now is, the owner of any water rights claimed in said affirmative defense or

e right to use any water whatsoever, or at all, d denies that the Antler Land Company, a Mon- na Corporation, as the lessee of Mrs. Barney adow, is entitled to the enjoyment, use and con- ol of 84.3 inches of water from the Little Big orn River, or of any amount of water, or any ater at all from the said Little Big Horn River, any of the waters from the said Crow Indian eservation as diminished. [158]

XXII.

Admits the allegations contained in Paragraphs and 26 of the said further answer and affirma- e defense.

XXIII.

Denies that it has any knowledge or information to whether any of the lands described in para- aph 26 were irrigable lands and were located un- r a ditch proposed and surveyed by the United ates Indian Irrigation Service and designated by ch Service as Upper Little Horn Ditch Number denies that when the lands described in para- aph 26 were allotted, that the use of the waters the streams of the Crow Indian Reservation or the Little Big Horn River and its tributaries, re reserved to each individual Indian named in ragraph 26 of said affirmative defense in any nount whatsoever for irrigation purposes, or any ner use or purpose whatsoever, and denies that ch Indian allottee was, or became vested with any ht or rights incident to the ownership of said

waters, or that said waters became appurtenant to the lands so allotted to each said Indian, and denies that each said Indian owned or had any ownership in any of said waters.

XXIV.

Admits that each of said Indians died, but denies that any waters of the Crow Indian Reservation or the title thereto, became vested in each of said Indians or any of them; admits that the lands described in paragraph 26 of the affirmative defense were sold at public sales and in this connection alleges that said lands were sold as non-irrigable lands; admits that at such sales the predecessors in interest of one Mabel Pace purchased the said lands, and that the plaintiff issued and delivered to the predecessors in interest of the said Mabel Pace, patents in fee conveying the said lands so sold. [159]

XXV.

Admits that either the said Mabel Pace or her predecessors in interest at some time prior to the commencement of this action placed the said lands under irrigation, but denies that it has any knowledge as to when such lands were, prior to the commencement of this action, placed under irrigation; denies that it has any knowledge or information as to whether or not the lands described in paragraph 26 of the affirmative defense lie under the Little Big Horn Ditch Number 3, or whether said ditch was proposed and surveyed by the United States Indian Irrigation Service; denies that it has any

knowledge or information as to whether the predecessors in interest of Mabel Pace were advised that the said lands, or any part thereof, were capable of being irrigated from said proposed ditch or were within the area to be irrigated by said proposed ditch; admits that the said predecessors in interest of Mabel Pace were advised that they should not, must not attempt any irrigation of the said lands; denies that it has any knowledge as to whether the said predecessors in interest of Mabel Pace were advised that the United States Indian Irrigation Service had surveyed and intended to construct said Upper Little Horn Ditch Number 3, or that the same would irrigate all of the lands described in paragraph 26 of the said affirmative defense or any part thereof; denies that predecessors in interest of Mabel Pace relied upon any statements or promises made by the plaintiff; denies that it has any knowledge as to whether the said predecessors in interest made any surveys.

XXVI.

Admits that prior to the commencement of this action, predecessors in interest of Mabel Pace or Mabel Pace, or her agents, constructed an irrigation ditch tapping the Little Big Horn River and that upon the completion of said ditch conveyed waters from said river to over and upon the lands described in paragraph 26 of the said affirmative defense, and have continued to so convey the said water from said river through said ditch to [160] and upon said lands, and irrigated said lands with

the water so conveyed through said ditch; denies that it has any knowledge as to whether or not the irrigation ditch so constructed was constructed on October 13, 1917, or the exact amount or acreage of land irrigated by the said waters of said ditch, but in this connection alleges that such ditch was constructed prior to the commencement of this action and water continuously used from the said Little Big Horn River by means of said ditch, upon the lands described in paragraph 26 of the said affirmative defense.

XXVII.

Admits that said ditch is approximately one-half mile in length before reaching the land of Mabel Pace; admits that in conveying the water through said ditch, there is a loss from seepage and evaporation; denies that it has any knowledge as to whether or not one-half miner's inch of water per acre is used upon said land; denies that the said Mabel Pace is entitled to an appropriation of 38 miner's inches of water, or any amount of water whatsoever at the point where the said water is diverted from the Little Big Horn River, or at any point of diversion from the said Little Big Horn River for the irrigation of 73.6 acres of such land or for the irrigation for any part or portion or amount of said land whatsoever.

XXVIII.

Denies that by the construction of the said ditch or by the placing of the said lands under irrigation

by Mabel Pace or her predecessors in interest, or her agents, or by the diversion of water from the said Little Big Horn River, or by the use of the same for irrigating the lands of the said Mabel Pace, that the said predecessors in interest obtained any valid appropriation or right to the use of 38 miner's inches of water of the said Little Big Horn River, or any amount of water whatsoever, or appropriation from said river; admits that ever since the first use of the said waters, the said Mabel Pace, her predecessors in interest and her agents, have continuously diverted and used waters from the said Little Big Horn River for the irrigation of [161] said land; denies that by such use or by any use of such water, the predecessors in interest of the said Mabel Pace, or the said Mabel Pace, acquired a vested water right or any water right whatsoever, in the said Little Big Horn River for 38 miner's inches of water or any number of inches of water whatsoever as of the date May 7, 1868, or as of any date or time whatsoever; denies that the said predecessors in interest of the said Mabel Pace or the said Mabel Pace, purchased any right of any Indian allottee to the use of said water or acquired any right to the use of said water whatsoever, by the purchase of the lands described in paragraph 26.

XXIX.

Admits that by mense conveyances from the original patentees, Mabel Pace became and is the owner of the legal title to all the lands described in para-

graph 26 of the affirmative defense; denies that by such mense conveyances, or otherwise, or at all, Mabel Pace or her predecessors in interest became the owner of the water rights described and claimed by her in her said affirmative defense or became the owner of any water right whatsoever, or the right to use any of the waters of the Little Big Horn River, or the waters of the Crow Indian Reservation for any purpose, upon any lands owned by her within the said Crow Indian Reservation; denies that she is entitled to the use, enjoyment and control of 38 miner's inches of water of the Little Big Horn River or any water whatsoever from said Little Big Horn River or from any of the streams of the Crow Indian Reservation.

XXX.

Admits that the defendant H. G. Campbell is the lessee under the lease from Mabel Pace, and denies that by reason thereof, he became or is entitled to the use of any of the waters of the Little Big Horn River or of the Crow Indian Reservation in irrigating any of the lands described in paragraph 26 of the said affirmative defense, or for any other purpose whatsoever. [162]

XXXI.

Admits the allegations set out and contained in paragraphs 35 and 36 of the said further answer and affirmative defense.

XXXII.

Denies that it has any knowledge as to whether the lands so allotted were irrigable lands or were located under a ditch proposed and surveyed by

he United States Indian Irrigation Service and lesignated by such service as Upper Little Horn Ditch Number 3.

XXXIII.

Denies that when the lands were so allotted to such members of the Crow Tribe of Indians named n paragraphs 35 and 36 of the said affirmative lefense, that the use of the waters of the streams of the Crow Indian Reservation or the waters of he Little Big Horn River or its tributaries were reserved for each individual Indian named in paragraph 36 in any amount whatsoever, for irrigation r any other purpose, and denies that thereupon, r at all, each or any of the said Indian allottees vas or were vested with the ownership of said vaters or any part thereof, or any right or rights ncident to such ownership, and denies that the said vaters or any part thereof, or any waters of the Crow Indian Reservation became appurtenant to uch lands so allotted to each said Indian, or any f them.

XXXIV.

Admits that each of the Indians described in aragraph 36 died, and denies that before their eaths any of the waters of the Crow Indian Reservation became vested in any of said Indians; admits hat thereafter, the lands described in paragraph 6 of the affirmative defense were sold at public les by the plaintiff, and in this connection alleges hat said lands were sold as non-irrigable lands; dmits that at such sales the predecessors in interest

of one Edith G. Belken and Judy Walsh purchased the said lands, and admits that thereafter the plaintiff issued and delivered to the predecessors in interest of Edith G. [163] Belken and Judy Walsh, patents in fee conveying each of the tracts of land so sold; admits that after the issuance and delivery of the patents to the lands so purchased, and prior to the commencement of this action, predecessors in interest of the said Edith G. Belken and Judy Walsh proceeded to place the said lands, or a portion of them so purchased, under irrigation; denies that it has any knowledge as to whether the said lands described in paragraph 36 of the affirmative defense lie under the Upper Little Horn Ditch Number 3, or that said ditch was proposed and surveyed by the United States Indian Irrigation Service; denies that it has any knowledge or information as to whether the predecessors in interest of the said Edith G. Belken and Judy Walsh were advised by the plaintiff that the said lands or any portion thereof, were capable of being irrigated or that they were under the said ditch or were within the area to be irrigated by the United States Indian Irrigation Service ditch, designated as Upper Little Horn Ditch Number 3; admits that the predecessors in interest of Edith G. Belken and Judy Walsh were advised by the plaintiff that they should not, must not attempt any irrigation of the said lands so purchased by them and described in paragraph 36 of said affirmative defense; denies that it has any knowledge that the said predecessors in interest of

the said Belken and the said Walsh were advised that the United States Indian Irrigation Service had surveyed and intended to construct Upper Little Horn Ditch Number 3 or that the same would irrigate the lands described in paragraph 36 of the affirmative defense or any portion thereof; denies that the predecessors in interest of the said Belken and said Walsh relied upon any statements or promises made by the plaintiff; denies that it has any knowledge as to whether or not they made any surveys. [164]

XXXV.

Admits that at some time prior to the commencement of this action, predecessors in interest of the said Edith G. Belken and Judy Walsh, or the said Judy Walsh and the said Edith G. Belken, or their agents, constructed an irrigation ditch tapping the Little Big Horn River, and that after the said ditch was constructed, water was taken from said river through said ditch and conveyed over and upon the lands described in paragraph 36 of the said affirmative defense; that ever since the construction of said ditch, water has been taken, to the present time, from the said river through the said ditch for the purpose of irrigating the said lands with said water; denies that it has any knowledge as to whether or not the said ditch was constructed on October 13, 1917 or that it has any knowledge as to the exact date prior to the commencement of this action when the said ditch was constructed, and denies that it has any knowledge

as to the exact acreage irrigated by the waters of the said Little Big Horn River, conveyed through said ditch.

XXXVI.

Admits that the said ditch is approximately one mile in length before it reaches the land of the said Edith G. Belken and Judy Walsh, and admits that there is a loss of water from the seepage and evaporation in conveying the same through said ditch; denies that it has any knowledge or information as to whether one-half miner's inches of water per acre has been delivered upon the said land and denies that the said Edith G. Belken and Judy Walsh are entitled to an appropriation of 42 miner's inches of water, or any other amount of water, or any amount of water whatsoever at the point where the said water is diverted from the Little Big Horn River or from any point of diversion from the said Little Big Horn River for the irrigation of 80.3 acres of the said land, or any amount or part or portion of said land whatsoever. [165]

XXXVII.

Denies that by the construction of the said ditch or by the diversion of water from the said Little Big Horn River, or by the use of the water so diverted in irrigating the lands described in paragraph 36 of the affirmative defense, that the predecessors in interest of the said Edith G. Belken and Judy Walsh, or the said Edith G. Belken and Judy Walsh, made any valid appropriation of 42 miner's inches of water of the Little Big Horn

River or any miner's inches whatsoever, of the water of the said river, or became entitled to the use of any of the waters of the said river, or of the Crow Indian Reservation; admits that since the construction of said ditch, the said predecessors in interest of the said Edith G. Belken and Judy Walsh or the said Edith G. Belken and Judy Walsh or their agents and lessees have continuously diverted and used water from the said Little Big Horn River upon the said lands described in paragraph 36 of the affirmative defense, and denies that by said diversion and use they acquired a vested water right, or any water right whatsoever in the said Little Big Horn River or in any of the streams of the Crow Indian Reservation for 42 inches of water or any amount of inches of water whatsoever, or any water whatsoever as of the date of May 7, 1868, or as of any date whatsoever, or at all; denies that the predecessors in interest of the said Edith G. Belken and Judy Walsh, or the said Edith G. Belken and Judy Walsh purchased any right to the use of any of such waters.

XXXVIII.

Admits that by mense conveyances from the original patentees, said Edith G. Belken and Judy Walsh, are the owners of the legal title to the lands described in paragraph 36 of the affirmative defense, but denies that they are the owners of, by reason of such purchase, or otherwise, or at all, of the water rights claimed by them in their

said affirmative defense, or any water rights whatsoever, or the right to use the waters of the Little Big Horn River, or of the Crow Indian Reservation [166] for any purpose whatsoever, upon the lands described in paragraph 36 of said affirmative defense or upon any lands whatsoever.

XXXIX.

Admits the allegations of paragraphs 45 and 46 of said further answer and affirmative defense.

XXXX.

Denies that when the lands described in paragraph 46 were allotted to the Indians named in paragraph 45 that the use of the water from the streams of the Crow Indian Reservation or the waters of Lodge Grass Creek or its tributaries were reserved to the individual Indian named in said paragraph in any amount whatsoever, or for any purpose whatsoever; denies that the said Indian allottee was vested with ownership of the said waters or any right or rights incident to ownership and denies that any title to the said waters or any right to the use of the same became appurtenant to the land allotted to said Indian.

XXXXI.

Admits said Indian described in paragraph 46, died, and denies that at the time of his death or at any time whatsoever, any reserved water or any waters whatsoever became vested in said Indian or

became appurtenant to the land allotted to said Indian described in paragraph 46 of the said affirmative defense and admits that after the death of said Indian, the lands described in paragraph 46 of the affirmative defense was sold by the plaintiff at public sale, and in this connection alleges that said lands were sold as non-irrigable lands; admits that at such sale, the predecessor in interest of one Billie Miller purchased the land, and that thereafter, the plaintiff issued and delivered to the said predecessor in interest of Billie Miller, patent in fee to said land. [167]

XXXXII.

Admits that prior to the commencement of this action, the said Billie Miller or his predecessors in interest, proceeded to place the said lands, or a portion of them, under irrigation, and irrigated the same, and admits that he or they constructed an irrigation ditch, prior to the commencement of this action, tapping Lodge Grass Creek through which ditch, he or they, conveyed water from the said Lodge Grass Creek to and upon the said lands described in paragraph 46, the exact amount of lands so irrigated being unknown to the plaintiff, and that ever since then said Billie Miller, his agents and his predecessors in interest have conveyed the waters from said Lodge Grass Creek through the ditch, to and upon said lands, and have irrigated said lands with the waters so conveyed through said ditch.

XXXXIII.

Admits that the said ditch is approximately one-half mile in length before it reaches the land of Billie Miller, and that in conveying the water for the irrigation of said lands from Lodge Grass Creek, there is a loss by seepage and evaporation, the exact amount of water loss being unknown to the plaintiff; denies that it has any knowledge as to whether the said Billie Miller has used one-half of one miner's inch of water; denies that the said Billie Miller is entitled to an appropriation of 57 miner's inches of water, or any amount of water whatsoever, at the point where the water is diverted from Lodge Grass Creek, or at any point of diversion from Lodge Grass Creek for the purpose of irrigating 111.6 acres of land owned by him, or any amount or part, or portion owned by him. [168]

XLIV.

Denies that by the construction of the ditch or by his efforts to place the said lands under irrigation or by the diversion of waters from Lodge Grass Creek, the defendant ever appropriated or obtained any valid appropriation to 57 miner's inches of water of Lodge Grass Creek, or any amount of water from Lodge Grass Creek whatsoever; admits that since the first use of the water of Lodge Grass Creek by Billie Miller, that he has continued to divert and use waters of Lodge Grass Creek for the irrigation of said lands, the exact amount being unknown to this plaintiff, and denies that by the

diversion of said water or the use of said water or by the purchase of any right of any Indian allottees the said Billie Miller acquired a vested water right or any water right whatsoever in or to the waters of said Lodge Grass Creek, or any of the waters of the Crow Indian Reservation for 57 miner's inches of water, or any amount of water whatsoever, as of the date of May 7, 1868, or as of any date or time whatsoever.

XLV.

Admits that the defendant Billie Miller is the owner of the legal title to the lands described in paragraph 46 of the affirmative defense; denies that there is any water or water right whatsoever appurtenant to, belonging to, or anywise appertaining to the said lands, and denies that he was the owner by reason of the purchase of the said lands or otherwise owned all or any water right claimed by him in his said affirmative defense, or any water right whatsoever, or the right to use any of the waters of said Lodge Grass Creek, or of the Crow Indian Reservation.

XLVI.

Admits the allegations of paragraphs 54 and 55 of said affirmative defense. [169]

XLVII.

Denies that when the lands were so allotted to the Indians named in paragraphs 54 and 55 that the use of the waters of the streams of the Crow Indian Reservation or the waters of Lodge Grass

Creek or its tributaries were reserved to the individual Indians named in paragraph 55 of the said affirmative defense, or any or either of them, in any amount whatsoever for irrigation or any other purpose; denies that thereupon or at all, the said Indians or any of them were vested with any rights incident to the ownership of the said waters and denies that the right to the said waters or the said waters themselves, became appurtenant to the lands so allotted to the said Indians or any of them.

XLVIII.

Admits that each of the said Indian allottees died and denies that prior to time or any time whatsoever, any reserve waters became vested in the said Indians, or any of them, and admits that the lands described in paragraph 55 of the affirmative defense were sold by the plaintiff at public sales, and in this connection alleges that said lands were sold as non-irrigable lands; admits that at such sales, the predecessors in interest of the defendant Robert J. Miller purchased the said lands and that thereafter, the plaintiff issued and delivered to the predecessors in interest of said Robert J. Miller, patents in fee conveying to them the said lands; denies that the use of the water for irrigation to the said land described in paragraph 55 was a right, or a privilege, or an immunity, or an appurtenance belonging to the said land; denies that by the purchase of said land, or by the issuance of said patents, the said predecessors in interest of the said Robert J.

Miller, or the said Robert J. Miller, became entitled to the use of any of the waters of Lodge Grass Creek, or of the Crow Indian Reservation, for irrigation or any other purpose. [170]

XLIX.

Admits that after securing title to the said premises, predecessors in interest of the said Robert J. Miller, or the said Robert J. Miller, constructed an irrigation ditch tapping Lodge Grass Creek, and that through the said ditch the said predecessors in interest of the defendant Robert J. Miller, or the said Robert J. Miller or his agents, conveyed and continued to convey the waters of said Lodge Grass Creek through said ditch over and upon the lands described in paragraph 55 of the said affirmative defense, and have used the said water so conveyed to irrigate said lands, the exact amount of said lands so being irrigated being unknown to this plaintiff.

L.

Admits that the said ditch is approximately one-eighth mile in length before it reaches the said land and that in conveying the said water through said ditch, there is a loss from seepage and evaporation, the exact loss being unknown to the plaintiff; plaintiff denies that it has any knowledge as to whether or not the said Robert J. Miller or his agents, have used one-half of one miners' inch of water per acre in irrigating the said land; denies that this said Robert J. Miller is entitled to an

appropriation of 77 miner's inches of water or an appropriation of any water whatsoever, at the point where the same is diverted from Lodge Grass Creek, or from any point at all of diversion from Lodge Grass Creek for the irrigation of 143.7 acres of said land, or for the irrigation of any part or portion of said land whatsoever.

LI.

Denies that by the construction of said ditch or by the efforts to place the said lands under irrigation, or by the diversion of water from Lodge Grass Creek, or by the use of the said water so diverted in the irrigation of the said land described in paragraph 55 of the said affirmative defense, that the said defendant Robert J. Miller made a valid appropriation of 77 inches of water of Lodge Grass Creek, or any amount [171] of water whatsoever from Lodge Grass Creek, admits that ever since the first use of said water, the said defendant has continuously diverted and used water from Lodge Grass Creek for the irrigation of his said lands, the exact amount of water so used being unknown to this plaintiff; denies that by said diversion and use, and because of the purchase of the right of any Indian allottee, the defendant Miller acquired a vested water right, or any water right whatsoever, or any right to the use of the waters of Lodge Grass Creek for 77 inches of water, or for any number or amount of inches of water whatsoever as of the

date of May 7, 1868, or any date whatsoever, or at all.

LII.

Admits that by mense conveyances, from the original patentees, the defendant Robert J. Miller is the owner of the legal title to the lands described in paragraph 55 of the affirmative defense; denies that the water right claimed by the said defendant Miller in his said affirmative defense is a tenement, hereditament, or appurtenance to, or in anywise belonging or appertaining to the lands so purchased by his predecessors in interest; denies that by the purchase of said land, he, or his predecessors in interest, acquired any water right in Lodge Grass Creek or in the waters of the streams of the Crow Indian Reservation or any right to the use of the waters of Lodge Grass Creek, or of any of the streams of the Crow Indian Reservation for irrigation or any other purpose.

LIII.

Admits the allegation contained in paragraph 63 and 64 of the said affirmative defense.

LIV.

Denies that when the lands were so allotted to the Indians described in paragraph 63 of the affirmative defense, the use of the waters of the streams of the Crow Indian Reservation, or the waters of the Little Big Horn River and its tributaries, was reserved to each individual Indian named in para-

graph 64 of this affirmative defense in any amount whatsoever, for any beneficial use whatsoever, or for the purpose [172] of irrigating land; denies that thereupon each of the Indian allottees were vested with the rights incident to the ownership of any waters or owned any waters, and denies that any such waters or any waters whatsoever became appurtenant to the lands so allotted to the said Indians described in paragraphs 63 and 64 of said affirmative defense.

LV.

Admits that each of the Indians described in paragraph 63 of said affirmative defense died; denies that at the time of the death of each of the Indians prior thereto, any reserve waters had become vested in the said Indians or any of them; admits that the land described in paragraph 64 of the affirmative defense were, after the death of said Indians, sold by the plaintiff at public sales, and in this connection alleges that said lands were sold as non-irrigable lands; admits that at such sales the predecessors in interest of the defendants Jay L. Henman and Ruth Henman purchased the said lands; admits that the plaintiff thereafter issued and delivered to the predecessors in interest of Jay L. Henman and Ruth Henman, patents in fee to said lands.

LVI.

Admits that after the issuance and delivery of patents to the lands so purchased and prior to the institution of this action, the predecessors in inter-

est of the said Jay L. Henman and Ruth Henman proceeded to place the said lands or some part thereof, under irrigation, and that they constructed an irrigation ditch tapping the Little Big Horn River and through this ditch the predecessors in interest of the said Jay L. Henman and Ruth Henman or the said Jay L. Henman and Ruth Henman and their agents, had conveyed water from the said Little Big Horn River since the completion of the said ditch and through the same, over and upon the lands described in paragraph 64 of this affirmative defense and have irrigated said lands with the water so conveyed through said ditch, the exact amount of said lands so irrigated being unknown to the plaintiff. [173]

LVII.

Admits that the said ditch is approximately one-half mile in length before it reaches the land of the said Jay L. Henman and Ruth Henman, and that in conveying the water from the Little Big Horn River over and upon said land, there is a loss of water from seepage and evaporation, the exact amount of loss being unknown to the plaintiff; denies that the said Jay L. Henman and Ruth Henman are entitled to an appropriation of 60.0 miner's inches of water or an appropriation of any amount or quantity of water whatsoever to the point where said water is diverted from Big Little Horn River or from any point of diversion from the Little Big Horn River for the purpose of irri-

gation of 58.6 acres of irrigated land, or any amount or quantity of land whatsoever.

LVIII.

Denies that by the construction of the ditch described in the affirmative defense, the defendants Jay L. Henman and Ruth Henman or by the efforts of the predecessors in interest for the said defendants to place said lands under irrigation, or by the diversion of water from the said Little Big Horn River or by the use of water so diverted in the irrigation of the land described in paragraph 64 of said affirmative defense, that the said defendants Jay L. Henman and Ruth Henman, or their predecessors in interest, obtained any valid appropriation or right to the use of 60 inches of waters of said Little Big Horn River, or of any amount or quantity of the waters of Little Big Horn River or any waters whatsoever, of the Little Big Horn River; admits that ever since the first use of the water, defendants or their predecessors in interest have continuously diverted and used water from the Little Big Horn River for the irrigation of the said defendant's lands; denies that the said diversion and use or use of the said waters or because of the purchase of the right of any Indian allottees, the defendants acquired a vested water right, or any water right whatsoever, in the said Little Big Horn River for 60 inches of water or any [174] amount or quantity of water whatsoever, or at all, as of the date May 7, 1868, or any other date or time whatsoever, or at all.

LIX.

Admits that by mesne conveyances from said original patentees, the defendants Jay L. Henman and Ruth Henman are the owners of the legal title to the land described in paragraph 64 of the affirmative defense; denies that there is any water right as claimed by the said defendants in their affirmative defense, or that there is any right to use the waters of any of the streams within the Crow Indian Reservation that is a tenement, hereditament or appurtenance belonging to the said land or that any such right accrued to the said defendants by reason of the sale of said land to their predecessors in interest or by reason of their ownership of the legal title to the said land, or at all.

I.

The plaintiff denies generally, each and every matter, thing, and allegation contained in said further answer and affirmative defense not herein admitted, qualified or denied.

II.

Replying to the said answer as a whole and to each and every allegation of new matter or affirmative matter therein contained, plaintiff denies generally each and every allegation of new matter or affirmative matter therein contained not herein specifically admitted, qualified or denied.

WHEREFORE, The plaintiff having fully replied to the said answer and the allegation therein contained, renews the prayer for the relief prayed

for heretofore in plaintiff's complaint on file herein.

JAMES H. BALDWIN
United States Attorney
R. LEWIS BROWN
Assistant U. S. Attorney
KENNETH R. L. SIMMONS
District Counsel, Indian
Irrigation Service. [175]

United States of America
District of Montana—ss.

R. LEWIS BROWN, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing reply; that he has read the said reply and knows the contents thereof, and that the same is true to the best of his knowledge and information and belief.

R. LEWIS BROWN.

Subscribed and sworn to before me this 25th day of October, 1934.

[Seal] C. G. KEGEL
Deputy Clerk U. S. District
Court, District of Montana.

[Endorsed]: Filed Oct. 25, 1934. [176]

Thereafter, on April 12th, 1935, an

ORDER DENYING MOTION TO MAKE OTHER PERSONS PARTIES DEFENDANT

was duly filed and entered herein, in the words and figures following, towit: [177]

[Title of Court and Cause.]

The motion of defendants Nickels Dethlefsen and Mary Dethlefsen to make the parties therein named parties defendant in the above entitled cause was submitted on briefs. From a consideration of the matter, it does not appear that the parties named are necessary to a determination of the issue here involved; consequently the motion is denied.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Apl. 12, 1935. [178]

Thereafter, on July 25, 1935, Plaintiff filed herein its proposed findings of fact and conclusions of law, in the words and figures following, towit: [179]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

That on the 7th day of May, 1868, a treaty was entered into by and between the United States of

America and the Crow Tribe or nation of Indians, wherein and whereby a certain tract of land in the then territory but now the State of Montana, was set aside and reserved for the use of said Crow Indians as a home and abiding place of said Indians which said treaty was ratified by the Senate of the United States on July 5, 1868, and proclaimed August 8, 1868 by the President of the United States. That said tract of land so set aside for the use of said Indians, except only as the exterior boundaries of said reservation were altered, and the lands within the reservation diminished by further treaties between the United States and said Crow Tribe or nation of Indians, has since May 7, 1868 been and now is an Indian Reservation, the home and abiding place of said Crow Tribe or nation of Indians. [180]

II.

That the defendants, Thomas R. Powers, Edward Schroeder, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana Corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Reg. Pearce, Jay L. Henman, Ruth Henman, F. L. Yates, Emma F. Yates, George S. Gibson, Joseph A. Graham, Dominic Stevens, Nickels Dethlefsen, Mary Dethlefsen, C. E. Linthacum, Billie Millet and Robert J. Miller, are citizens and residents of the United States and the State of Montana, and that they reside within the confines of the Crow Reservation in Montana. That Antler Land Com-

pany is a corporation created, organized and existing under and by virtue of the laws of the State of Montana.

III.

That large portions of the lands within said Reservation, approximately 73,000 acres thereof, are arid in character but susceptible to farming and cultivation providing water is made available for the purpose of irrigating them. That these lands require on the average of one miner's inch of water to the acre, for the proper irrigation of the same, and the raising of crops thereon.

IV.

That at the time of the ratification of said treaty of May 7, 1868, and ever since that time continuing to the present, the Little Big Horn River and Lodge Grass Creek are existing unnavigable streams of water rising in the Big Horn Mountains and flowing in a northerly direction within the boundaries of the Crow Indian Reservation.

V.

That in the year 1885, the United States commenced the construction of the Crow Irrigation Project by building the Reno Ditch to divert waters from the Little Big Horn River for the irrigation of lands within said Reservation as diminished as aforesaid, which ditch at that time had a carrying capacity of 60 cubic feet of water per second of time

which was enlarged and extended in the year 1917 to a capacity of 85 cubic feet per second of time. [181]

That following the construction of the Reno Ditch in 1885, the United States constructed as units of its irrigation project in the Lodge Grass and Little Big Horn Valleys in the year 1892 Agency Ditch with a capacity of 209 cubic feet of water per second of time; in the year 1893 the Forty Mile Ditch with a capacity of 89 cubic feet of water per second of time; in 1893 Lodge Grass No. 1 with a capacity of 223 cubic feet of water per second of time; in the year 1904 Lodge Grass No. 2 with a capacity of 37 cubic feet of water per second of time; in the year 1910 Upper Little Horn No. 2 with a capacity of 150 cubic feet of water per second of time.

That each year since the construction of these units, the United States has diverted through said ditches waters of said streams and has used the same in irrigating the lands within said reservation as diminished, and such waters were used each year continuously thereafter to the present time for the farming and cultivation of said lands, and all of the waters so diverted were necessary for such use and without the same such arid lands could not have been farmed, cultivated, and made to produce crops.

VI.

That in July, 1922, the United States acquired a right to flow through the Bozeman Trail Ditch sufficient water to properly irrigate 1961.34 acres of

allotted Indian lands in said reservation as diminished as aforesaid.

VII.

That said ditches divert and take the waters of said Little Big Horn River, Lodge Grass Creek and their tributaries and conduct and carry said waters to and upon the Indian lands within said reservation. [182]

VIII.

That there are approximately 23,000 acres of said land susceptible of being cultivated if water were available, lying under that portion of said Crow Irrigation Project which diverts the waters of the Little Big Horn River, Lodge Grass Creek and their tributaries, but that all of the waters flowing normally in the Little Big Horn River and Lodge Grass Creek and their tributaries during the irrigation season of each year have never been and are not now sufficient to irrigate more than 8,084 acres lying within the Little Big Horn and Lodge Grass Valleys, and that no part of said lands can be irrigated except with waters which flow from said Little Big Horn River and Lodge Grass Creek and their tributaries through said irrigation project to said lands.

IX.

That the normal flow of the waters in said streams and their tributaries is wholly insufficient to successfully irrigate the lands susceptible of irrigation and cultivation lying under said irrigation project

lands actually farmed and cultivated in this area from the years 1931 to 1934 inclusive.

X.

That the defendants Thomas R. Powers, Edward Schroeder, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana Corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Reg. Pearce, Jay L. Henman, Ruth Henman, F. L. Yates, Emma E. Yates, George S. Gibson, Joseph A. Graham, Dominic Stevens, Nickels Dethlefsen, Mary Dethlefsen, C. E. Linthacum, Billie Miller and Robert J. Miller own or control lands lying within the Crow Indian Reservation as diminished as aforesaid, which lands are adjacent to or in close proximity of the Little Big Horn River [183] or Lodge Grass Creek or their tributaries. That each of these defendants have been for many years past and are now wrongfully, unlawfully and without right, and against the wish and will of the plaintiff, its Indian wards and the Crow Tribe or nation of Indians, diverting these waters of Little Big Horn River, Lodge Grass Creek and their tributaries for the irrigation of their lands through dams and ditches dug and constructed by them without the consent of the United States or its Indian wards, or the Crow Tribe or nation of Indians.

That these diversions of said defendants are greatly reducing and diminishing the water supply of said streams and are causing serious crop losses and doing irreparable damage to the United States, its Indian wards, and the Crow Tribe or nation of

Indians, and will continue to cause the plaintiff and its Indian wards to suffer irreparable loss, injury and damage so long as the defendants continue to divert and use the waters of said streams.

XI.

That the Crow Irrigation Project is owned jointly by the United States and the Crow Tribe or nation of Indians which includes that portion of it diverting the waters of said Little Big Horn River, Lodge Grass Creek and their tributaries. That the expenditures of moneys to June 30, 1926, for the construction of this irrigation project on the Crow Reservation totalled $1,977,890.10. Of this sum $1,565,235.31 were expended from tribal funds, $139,049.02 from gratuity appropriations and $273,594.77 from reimbursable appropriations. [184]

XII.

That the Secretary of the Interior under the authority granted him by Congress and the laws of the United States, has, since the time of the granting of such authority, secured a just and equal distribution of the waters of Little Big Horn River and Lodge Grass Creek and their tributaries among the Indians as a whole, residing upon the said Crow Indian Reservation as diminished except, as he has been prevented from so doing by the wrongful and unlawful interference by the defendants and each of them in diverting and using the waters of said streams and their tributaries and the Secretary of the Interior will be unable in the future to secure

a just and equal distribution of the said waters of said streams among the Indians residing upon the said Crow Indian Reservation as diminished under such rules and regulations as he may adopt, so long as the defendants or any of them continue in any manner or at all to divert or take any of the waters of the said Little Big Horn River, Lodge Grass Creek or their tributaries.

XIII.

That except as the same may be inconsistent with any finding of fact herein, the court finds generally all of the facts set out in the plaintiff's bill of complaint to be true. [185]

CONCLUSIONS OF LAW.

I.

That at the time of the adoption of the treaty of May 7, 1868, and the creation of the Crow Indian Reservation there was at that time reserved all of the waters of the reservation for the needs of the Crow Tribe or nation of Indians for irrigation, domestic, and other purposes.

II.

That the United States of America through the Secretary of the Interior has the right to completely control the use of the waters of streams flowing through or within the Crow Indian Reservation as diminished as aforesaid without interference by the defendants, each, all, or any of them.

III.

That the defendants and each and all of them, in their diversions of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries are committing acts of trespass for which they should be enjoined, and decree should issue in accordance with the prayer of the bill of complaint herein.

.....

Judge.

[Endorsed]: Filed as proposed July 25, 1935. [186]

Thereafter, on August 28, 1935, Defendants Dethlefsen filed herein their Motion for Findings of Fact and Conclusions of Law, with proposed findings and conclusions annexed thereto, in the words and figures following, towit: [187]

[Title of Court and Cause.]

MOTION.

Come now the defendants Nickels Dethlefsen and Mary Dethlefsen in the above cause and move the court to make and enter the findings of fact and conclusions of law hereunto attached and filed herewith.

JOHNSTON, COLEMAN
& JAMESON
By W. M. JOHNSTON
Attorneys for the defendant:
Nickels Dethlefsen and Mary
Dethlefsen.

Service of the foregoing motion and receipt of two copies of same admitted August ....., 1935.

.....

District Counsel, U.S.I.I.S.
Department of the Interior
and of counsel for plaintiff.

[188]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Based upon the admissions in the pleadings and of counsel made in open court upon the trial of said cause, and upon the proof submitted, the Court makes the following

FINDINGS OF FACT.

1. That Rosa Peters, nee Martinez, Arthur Peters, George Peters and Alice Peters are now and during their lifetime have been, members of the Crow Tribe of Indians.

2. That as such members of said tribe the following allotments of land on the Crow Indian Reservation in Montana were made to them:

To Rosa Peters, nee Martinez:

The southeast quarter of the southwest quarter, and the south half of the southeast quarter of section seven; the northwest quarter, and the northeast quarter of the southwest quarter of section seventeen; all in township eight south

of range thirty-four east of the Montana Meridian in Montana;

To Arthur Peters:

Lot three of section eighteen, and the north half of the northeast quarter, and the southwest quarter of the northeast quarter of section seventeen, all in township eight south of range thirty-four east of the Montana Meridian in Montana; [189]

To George Peters:

Lot four, the south half of the southeast quarter, and the southeast quarter of the southwest quarter of section eighteen, in township eight south of range thirty-four east of the Montana Meridian in Montana;

And to Alice Peters:

The southeast quarter of the southeast quarter of section thirteen, in township eight south, of range thirty-three east of said Meridian; the west half of the northwest quarter of section sixteen, and the southeast quarter of the northeast quarter of section seventeen, in township eight south of range thirty-four east of said Meridian.

3. That, in the year 1896 the said Rosa Peters, constructed or caused to be constructed the irrigation ditch described in the joint and several answer of the defendants Nickels Dethlefsen and Mary Dethlefsen, through which said ditch she diverted sufficient water to her said lands with which she irrigated in that year 33 acres of land, and there-

after, until she sold said land, she cultivated said 33 acres of land and irrigated the same each season with water conveyed through said ditch from Lodge Grass Creek to said lands; that in the year 1901 the parents of Arthur Peters, George Peters and Alice Peters, then minor children, conducted water through said irrigation ditch from Lodge Grass Creek to, over and upon the aforesaid lands of said minor children and by means thereof irrigated 47 acres of land in their said allotments and thereafter and each irrigation season until they sold their said lands they so continued to irrigate and cultivate said 47 acres of land lying in their said allotments and as described in defendant Dethlefsen's Exhibit 1 herein.

4. That thereafter and before any one of said Indians disposed of any part of their said lands, patents in fee simple for the aforesaid lands were issued and delivered to them by the United States, each of which said patents conveyed the lands in each of said allotments, together with "all the rights, privileges, immunities and appurtenances" thereunto belonging. [190]

5. Thereafter and in the year 1922, the aforesaid Crow Indians conveyed all of said lands to the defendants Nickels Dethlefsen and Mary Dethlefsen by warranty deeds conveying with said lands the appurtenances thereunto belonging.

6. That, in the year 1922, the defendants Nickels Dethlefsen and Mary Dethlefsen irrigated the aforesaid 33 acres of land in the Rosa Peters allotment

with waters conveyed from Lodge Grass Creek, through said irrigation ditch, and cultivated the same and raised crops of grass, hay and grain thereon, and each year since then have so continued to irrigate and cultivate said 33 acres of said land, and that shortly after they acquired said land they irrigated an additional 7 acres of land in said allotment with water conveyed from Lodge Grass Creek, through said ditch, and each year since then have so continued to irrigate and cultivate said additional 7 acres of land.

7. That, in the year 1922, the defendants Nickels Dethlefsen and Mary Dethlefsen irrigated the aforesaid 47 acres of land in the Arthur Peters, George Peters and Alice Peters allotments with waters conveyed from Lodge Grass Creek, through said irrigation ditch, and cultivated the same and raised crops of grass, hay and grain thereon, and each year since then have so continued to irrigate and cultivate said 47 acres of said land, and that shortly after they acquired said land they irrigated an additional 6 acres of land in said allotments with water conveyed from Lodge Grass Creek, through said ditch, and each year since then have so continued to irrigate and cultivate said additional 6 acres of land.

8. That the defendants Nickels Dethlefsen and Mary Dethlefsen in 1922 were, ever since have been, and now are, citizens of the United States and residents on the Crow Indian Reservation in Big Horn County, Montana.

9. That said irrigation ditch is of sufficient size and suitable grade and has sufficient capacity to carry and convey and does convey and carry 91.6 miner's inches of water from Lodge Grass Creek to the aforesaid lands of the defendants Nickels Dethlefsen and Mary Dethlefsen.

10. That the various irrigation ditches constructed [191] by the United States government on the Crow Indian Reservation are not units of one irrigation project or system but are each a separate irrigation project and system.

11. That plaintiff and the Crow Indians had diverted and used but a small amount of water from Little Big Horn River, Lodge Grass Creek, and their tributaries, for the irrigation of lands owned, occupied and cultivated by said Indians, and that the amount of such diversion cannot be determined from proof introduced upon the trial of this cause.

12. That the Bozeman*d* Trail Ditch was constructed in the year 1922, long after the water rights of the defendants Dethlefsen had become appurtenant to the above described lands.

13. That one-half miner's inch of water per acre delivered upon the land to be irrigated is sufficient for the irrigation of all classes of land in the valleys of said river, creek, and their tributaries.

14. That the loss from seepage and evaporation in conveying water from said Lodge Grass Creek, through said ditch to said lands of the defendants Dethlefsen, is approximately five miner's inches of water.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

1. Plaintiff has failed to establish a cause of action herein against the defendants Nickels Dethlefsen and Mary Dethlefsen.

2. By reason of the aforesaid appropriations of water made by the defendants Dethlefsen and their predecessors in interest, said defendants are the owners of a water right of 55 miner's inches of water from said Lodge Grass Creek for the irrigation of their said lands.

3. That as members of the Crow Tribe of Indians, the said Rosa Peters, Arthur Peters, George Peters and Alice Peters were entitled to divert and appropriate sufficient water from Lodge Grass Creek to irrigate that portion of their said allotments which they irrigated and cultivated prior to their sale and conveyance of their said lands and water rights to the defendants Dethlefsen, and that they were also entitled to addi- [192] tional water from said Lodge Grass Creek sufficient to irrigate additional lands in their said allotments which were so irrigated by the defendants Dethlefsen in the year 1922 and immediately after they acquired title to such lands.

4. That, as the assignees or grantees of said Crow Indians, Rosa Peters, Arthur Peters, George Peters and Alice Peters, the defendants Nickels Dethlefsen and Mary Dethlefsen acquired all rights

of their grantors as members of the Crow Tribe of Indians, to use the waters of Lodge Grass Creek for the irrigation of their said lands so acquired from said Crow Indians, and that as such assignees and grantees they now have the same right to divert water from Lodge Grass Creek through the aforesaid ditch for the irrigation of their said lands as though they were members of the Crow Tribe of Indians, or as their grantors would have had if they had not sold and conveyed the aforesaid lands to them.

5. The defendants Dethlefsen are entitled to a decree of this court dismissing this cause of action as to them. Let decree be drawn accordingly.

Signed and dated....., 1935.

.....

Judge.

[Endorsed]: Filed Aug. 28, 1935. [193]

Thereafter, on October 2nd, 1935, defendants Yates lodged herein their proposed findings of fact and conclusions of law in the words and figures following, to-wit: [194]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Based upon the admissions in the pleadings and of counsel made in open court upon the trial of the case and upon stipulation of counsel, and upon the

proof submitted at the trial, the Court makes the following

FINDINGS OF FACT

1. That one Back Bone was during her lifetime a member of the Crow Tribe of Indians and living upon the Crow Indian Reservation in the State of Montana.

2. That as such member of said tribe there was allotted to the said Back Bone as her individual property by the plaintiff, acting through its Special Allotting Agent, John K. Rankin, the following described allotment of land on the Crow Indian Reservation in Montana, to-wit:

> The Northeast Quarter (NE¼) of Section 17, Township 9 South, Range 33 East, Montana Principal Meridian, in Big Horn County, Montana. [195]

3. That after said allotment was duly made to the said Crow Indian Back Bone, and after the reserved waters became vested in her and became appurtenant to her land, the said Back Bone died and the United States Government, as the guardian of Back Bone's heirs, sold said allotment with its appurtenances to one Lulu L. McClure and issued to her patent conveying the land, together with all the rights, privileges, immunities and appurtenances thereunto belonging, and in the year 1928 the said Lulu L. McClure for a valuable consideration sold and conveyed by warranty deed said lands with their appurtenances to these defendants.

4. That in and about September, 1928, these defendants constructed an irrigation ditch tapping Lodge Grass Creek as described in the joint and separate answer of defendants F. L. Yates and Emma E. Yates to convey water upon their garden and small hayfield and for stock and domestic purposes, and used water through said ditch for said purposes; and that about the same time, the defendants constructed or placed and kept in a state of repair a ditch tapping Percheron Creek, a tributary of Lodge Grass Creek, as described in the joint and separate answer of these defendants, to convey water to irrigate some 50 acres of hayfield and used water through said ditch when any water was available for said purpose; all of which is more vividly shown on defendant's Exhibit 54, being a blue print on a large scale of defendant's holdings.

5. That within a short time after obtaining title to said land, these defendants also filed appropriations under the State Law appropriating waters from Lodge Grass Creek and Percheron Creek for the purpose of irrigating their hayfield, garden and for stock and domestic purposes as mentioned hereinabove.

6. That immediately after obtaining their land, these defendants proceeded to use water from the said Lodge Grass Creek and Percheron Creek and through the said two ditches to irrigate their crops and for stock and domestic purposes when water was available in said creeks. [196]

7. That Percheron Creek is a mountain stream flowing abundantly when the snows melt in the

early spring but becomes dry usually about the 1st of June of each year when water is most needed for irrigation purposes, and that these defendants obtain no water from Percheron Creek after June 1st; that from Lodge Grass Creek, these defendants have a ditch about a quarter of a mile long to irrigate from five to seven acres of garden and meadow with a two-inch pipe for supply of water for stock and domestic purposes. The waste water of which runs back into Lodge Grass Creek a short distance below defendants' home.

8. That during the main irrigation season, the defendants divert no water from Percheron Creek and from Lodge Grass Creek they need and divert one miner's inch for stock and domestic purposes and a small amount to irrigate their garden and small meadow, in all an insignificant amount.

9. That said two irrigation ditches are of sufficient size, grade and capacity to carry and convey, and do carry and convey when there is water available, 28 miner's inches of water from Percheron Creek and five miner's inches of water from Lodge Grass Creek to the aforesaid land of these defendants.

10. That one-half inch of water per acre delivered upon the land to be irrigated is sufficient for the irrigation of the various crops on all classes of land in the valley of the Little Big Horn River, Lodge Grass Creek and their tributaries.

11. That the plaintiff and the Crow Indians had diverted and used but a small amount of water from Little Big Horn River, Lodge Grass Creek and

their tributaries for the irrigation of lands owned, occupied, and cultivated by said Indians but the amount of such diversion cannot be determined from the proof produced at the trial of this cause.

12. That the defendants F. L. Yates and Emma E. Yates in 1928 were, and ever since have been, and now are husband and wife, citizens of the United States of America and residents on the Crow Indian Reservation in Big Horn County, Montana. [197]

Based upon the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW

1. That plaintiff has failed to establish a cause of action herein against the defendants F. L. Yates and Emma E. Yates and said cause should be dismissed as to these defendants.

2. That as a member of the Crow Tribe of Indians, the said Back Bone by the allotment made to her was entitled to divert and appropriate sufficient water from Lodge Grass Creek and its tributaries to irrigate the irrigible portion of her lands prior to her death; that said Lulu L. McClure by purchase from plaintiff as guardian of the heirs of the said Back Bone and by patent duly issued to her obtained the rights to the land and appurtenant water formerly held by the said Indian Back Bone.

3. That as grantees, the defendants F. L. Yates and Emma E. Yates acquired all the rights of their grantor Lulu L. McClure, who obtained the rights of the said Indian allottee, Back Bone, to the use

of the waters of Lodge Grass Creek and its tributaries for the irrigation of said land so acquired as aforesaid and formerly allotted to the said Indian, Back Bone; and that as such grantees, these defendants now have the same rights to divert water from Lodge Grass and Percheron Creeks through the aforesaid ditches for the irrigation of their said lands as though they were members of the Crow Tribe of Indians, or as the said Back Bone would have had had she not have lost her allotment by death.

4. That by the appropriations of water made by defendants Yates and their predecessors in interest said defendants are the owners of the water right of 28 miner's inches of water from Percheron Creek and 5 miner's inches of water from Lodge Grass Creek for the irrigation of their lands, upon the basis of one-half miner's inch per acre.

5. That defendants F. L. Yates and Emma E. Yates are entitled to a decree of this Court dismissing this cause of action as to them. [198]

A decree may be drawn accordingly.

Dated and signed this.....day of....., 1935.

.....

United States District Judge.

[Endorsed]: Lodged Oct. 2, 1935. [199]

Thereafter, on October 14, 1935, the defendants M. H. Tschirgi, et al, filed herein their motion for findings of fact and conclusions of law, with pro-

posed findings and conclusions annexed thereto, in the words and figures following, to-wit: [200]

[Title of Court and Cause.]

MOTION

Come now M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith C. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billy Miller and Robert J. Miller of above named defendants, and respectfully move the Court to make and enter the findings of fact and conclusions of law hereunto attached and filed herewith.

BURKE & COLLINS
By: E. E. COLLINS
BEN HARWOOD
Attorneys for above named defendants.

Service of the foregoing motion and receipt of two copies of same admitted October 11th, 1935.

KENNETH R. L. SIMMONS,
per H. J. C. District Counsel, Department of, Interior, U. S. I. I. S., Office of Solicitor, and of counsel for plaintiff. [201]

Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF M. H. TSCHIRGI, BERTHA TSCHIRGI, ANTLER LAND COMPANY, A MONTANA CORPORATION, B. B. BELKEN, EDITH G. BELKEN, JUDY WALSH, H. G. CAMPBELL, JAY L. HENMAN, RUTH HENMAN, BILLIE MILLER AND ROBERT J. MILLER, DEFENDANTS.

I.

Based upon the admissions in the pleadings and counsel made in open court upon the trial of said use and upon the evidence submitted and the roof adduced therefrom, the Court, in the case of fendants M. H. Tschirgi and Bertha Tschirgi, akes the following

FINDINGS OF FACT

1. That the facts set forth in section II, paraaph 16, of the answer of above named defendants e true; that neither M. H. Tschirgi nor Bertha chirgi are in possession of or have any control er or interest in the lands described in plaintiff's l of complaint and they are not involved in the ues of this cause.

II.

As to the defendant Antler Land Company, a ontana corporation, B. B. Belken, Edith G. Belken, dy Walsh, H. G. Campbell, Jay L. Henman, Ruth enman. Billie Miller and Robert J. Miller, the urt, based upon the admissions in the pleadings

and of counsel made in open court upon the trial of said cause and upon the evidence submitted and the proof adduced therefrom, makes the following

FINDINGS OF FACT

1. That the facts set forth in the answer [202] of the above named defendants and in each of their affirmative defenses to the bill of complaint herein are true.

2. That each of the above named defendants is the owner of the fee title, or a lessee in possession under valid and subsisting lease from the owner of the fee title, of the lands described in the answer of said defendants.

3. That the owners of said lands, whether the defendants themselves or lessors of the defendants, acquired title to said lands by mesne conveyances from the original patentees, who received patents in fee from the United States of America.

4. That in the year 1905 each and all of the Indians mentioned in the answer of above named defendants, as the original allottees of the lands described in defendants' answer as now owned or leased by said defendants, were members of the Crow Tribe or Nation of Indians and were residing on the Crow Indian Reservation in the State of Montana.

5. That sometime prior to the year 1905, the plaintiff herein, through its special allotting agent, or agents, duly and regularly allotted to said Crow Indians, and as their individual property, each and every the tracts of land described in the answer of

ove named defendants as now owned or under
ıse to said defendants.

6. That after above mentioned tracts of land
ere allotted as aforesaid, each of said Indian al-
ttees died and their allotments, or portions, or
rts thereof as specifically described in the answer
the above named defendants, were sold by the
aintiff, as guardian of its Indian Wards, at public
les, and at such sales the predecessors in interest
the above named defendants, or in certain in-
ances the predecessors in interest of the lessors
above named defendants as set forth in their
swer filed herein, purchasd the said lands to-
ther with all the rights, privileges, immunities
d appurtenances of whatsoever nature thereunto
longing and subsequently the plaintiff issued and
livered to said predecessors in interest of the
ove named defendants, or their lessors, patents in
, conveying to them said tracts of land so sold,
d no reservation of any character was made
erein relative to the water or water rights con-
cted with said lands. [203]

7. That in each instance, after the issuance and
livery of said patents in fee, either the defendants
emselves, or their predecessors in interest, or the
edecessors in interest of defendants' lessors, pro-
eded with reasonable diligence and constructed ir-
ation ditches through which said predecessors
nveyed water from the Little Big Horn River o.
dge Grass Creek, being unnavigable streams flow-
g within the boundaries of said Crow Indian
servation, to, over and upon parts or portions of

the irrigable lands contained within the above mentioned former Indian Allotments. That ever since then said predecessors, defendants' lessors and the above named defendants have conveyed water from the Little Big Horn River or Lodge Grass Creek through said irrigation ditches to and upon said lands and have continuously irrigated said lands with the water so conveyed; and with the aid of such irrigation and proper cultivation, have raised grass, hay, grains and other crops thereon.

8. That by mesne conveyances from said original patentees, the above named defendants, or their lessors, are now the owners of the legal title to all of the lands described in the answer of said defendants, together with all the appurtenances thereunto belonging.

9. That each of the defendants above named and their lessors at all times mentioned in the complaint and answer herein were, ever since have been, and now are, citizens of the United States and residents on the Crow Indian Reservation in Big Horn County, State of Montana.

10. That said irrigation ditches are of sufficient size and suitable grade, and have sufficient capacity to hold and conduct, and do hold and conduct an adequate supply of water from the Little Big Horn River or said Lodge Grass Creek to properly irrigate the irrigable lands described in the answer of the above named defendants.

11. That said lands so irrigated, and all thereof, need and require one-half of one miner's inch

f water per acre delivered thereon for the proper rigation thereof, with the exception of the lands f Jay L. Henman and Ruth Henman as described n the answer of said defendants, which latter lands, n account of the character of the soil thereof, need nd require one [204] miner's inch of water per cre delivered thereon for the proper irrigation hereof.

12. That, in making allotments to the original ndian allottees named in the answer of above named efendants, United States Special Allotting Agent, ohn K. Rankin, followed the written instructions his duly authorized superior officer and allotted acres of irrigable land to each of said Indian llottees.

13. That said United States Special Allotting gent Rankin, in reporting to his superior officer, d not record a written description of the lands so signated and allotted by him as irrigable.

14. That the instructions to United States Spe- l Allotting Agent, Charles E. Roblin, were to ake allotments to only such Indians as were living December 4, 1920, and not being called upon to ake additional allotments to the deceased Indians hose original allotments are now owned by de- ndant Antler Land Company, he therefore had no rasion to classify their original allotments as "ir- gable," "non-irrigable agricultural" or "grazing" nds; however, in the case of three Indian allot- s, who were still living on December 4, 1920, and hose former allotments are now owned by defend- t Antler Land Company, said Special Allotting

Agent Roblin did, pursuant to his aforesaid instructions, classify portions of their original allotments as "irrigable," the areas so classified being as follows:

Joseph Garrett Stewart	#3552	20.0 acres
Henry Keiser	#3313	31.2 acres
Juanita Keiser No. 2	#3314	40.0 acres

15. That said United States Special Allotting Agent Roblin also made additional allotments to fifteen other Crow Indians who had formerly been allotted lands which now lie under and are irrigated from the Farmers Alliance Ditch, and in making such additional allotments said allotting agent classified and evaluated their lands lying under said ditch as being "irrigable" lands, just as he had done in the case of the three allottees referred to in the paragraph last above. That the lands of the latter three Indians and the fifteen Indian allottees just mentioned were of the same character as to general situation, soil and irrigability as the other lands of defendant Antler Land Company lying, under the [205] Farmers Alliance Ditch as described in said defendants' answer.

16. That the Secretary of the Interior duly approved the said allotments made by Special Allotting Agent Roblin, based upon his designation and evaluation of the above mentioned eighteen tracts of land as irrigable.

17. That the United States government has made no division or allocation of the waters of said reservation to the individual Indians or to the various tracts of land allotted thereto.

18. That the Secretary of the Interior has made no rules or regulations for a division of the waters of the Crow Indian Reservation among the various individual Indians or the various individually allotted tracts of land within said reservation.

19. That the construction by the United States Indian Irrigation Service of the various irrigation ditches within the Crow Indian Reservation was for the sole purpose of conveying water from streams flowing within said reservation to various more or less contiguous groups of allotted Indian lands, and such construction was in no sense an attempt by the Secretary of the Interior or the United States government to divide or allocate the reservation waters to the Indian allotments lying thereunder, nor to the Indian owners thereof, to the exclusion of other Crow Indians allotted lands not lying under said government constructed ditches.

20. That the various irrigation ditches constructed by the United States government on the Crow Indian Reservation are not units of one integral irrigation project or system but are each a separate irrigation project and system.

I.

Based upon the foregoing Findings of Fact as to defendants M. H. Tschirgi and Bertha Tschirgi, the Court makes the following

CONCLUSIONS OF LAW

1. Plaintiff has failed to establish a cause of action herein against M. H. Tschirgi and Bertha

Tschirgi who were improperly joined as party defendants.

2. The defendants Tschirgi are entitled to a decree of this Court dismissing this cause of action as to them. [206] Let decree be entered accordingly.

VI.

Based upon the foregoing Findings of Fact as to defendants Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller, the Court makes the following:

CONCLUSIONS OF LAW.

1. That the plaintiff is not entitled to an injunction against the above named defendants, or any of them, depriving them of the use of water from the Little Big Horn River or Lodge Grass Creek. The plaintiff's prayer for injunction should be denied and the suit dismissed as to the above named defendants, and each of them.

2. That at all times mentioned in the pleadings in this action the Indians of the Crow Tribe were vested with the title to the lands and with the right to the use of the waters of the Crow Indian Reservation.

3. That the right of said Indians to the lands and to the use of the waters of said reservation was a common right until the lands were allotted to individual Indians, whereupon the right to the

use of the water necessary for the proper irrigation of the irrigable lands of each such allotment became vested in the individual Indian allottee with a priority of May 7, 1868, subject to equal distribution of the available water to the total irrigable lands of the reservation.

4. That the Indian predecessors of the defendants, or defendants' lessors, were allotted the lands described in defendants' answer.

5. That the plaintiff herein, the United States of America, conveyed all of said lands to the defendants, or their lessors, or the predecessors of the defendants, or their lessors, by patents in fee which included the water or water rights appurtenant to said lands.

6. That the above named defendants, or their lessors, by mesne conveyance are now the owners of the lands and the right to the use of the water claimed by them in their answer, and have [207] as complete a right thereto as their predecessors, including the original Indian allottees.

7. That the Secretary of the Interior had no power or authority to grant water or water rights to one Indian's land and take such rights away from another Indian's land.

8. That the Secretary of the Interior has made no attempt to determine what lands on the Crow Indian Reservation are entitled to the use of water.

9. That when the United States used Crow Tribal funds and constructed the U. S. Indian Irrigation Service ditches, it did so for the sole purpose of conveying water to lands lying under

said ditches, and such construction was not an adjudication that the owners of such lands were legally entitled to the use of water or that the owners of other reservation lands, not under said ditches were not entitled to the use of the waters of the reservation.

10. That the Indian predecessors of these defendants, and their lessors, were entitled to sufficient water to irrigate the irrigable lands of the defendants and their lessors, as described in their answer filed herein, provided, however, that there was sufficient water in the streams of the reservation for such purpose, and if there was not sufficient water then they were entitled to their pro rata share of such available water divided among the total area of irrigable lands in the reservation.

11. That the above named defendants, and their lessors, are now vested with all of the rights of their Indian predecessors, including the right to sufficient water to irrigate their lands to the same extent as the original Indian allottees.

12. That the plaintiff has failed to establish facts sufficient to constitute a cause of action or sufficient to entitle it to any relief as against these defendants or to justify the issuance of the injunction prayed for in plaintiff's complaint. Let decree be entered accordingly.

Signed and dated....., 1935.

.....

Judge.

[Endorsed]: Filed Oct. 14, 1935. [208]

Thereafter, on July 29, 1936, the Decision of the Court was duly filed herein, in the words and figures following, to-wit: [209]

[Title of Court and Cause.]

DECISION

This is a suit in equity brought by the plaintiff to restrain the twenty-two defendants above named from in any manner diverting the waters of Lodge Grass Creek and the Little Big Horn River and their tributaries, flowing within the Crow Indian Reservation in Montana, and from maintaining dams and ditches therein, and from interfering in any manner with the flow of these streams and their tributaries, and the use of the waters thereof. The order to show cause issued by the Court was later vacated, and upon denial of the motions to dismiss the complaint, the defendants were granted until October 10th, 1934, to file their answers. On that date answers were filed by all of the defendants, except Thomas R. Powers, Edward Schroeder, Reg. Pearce, George S. Gibson, Joseph A. Graham, Dominic Stevens and C. E. Linthacum, whose defaults were duly entered. Replies were filed by plaintiff to all answering defendants. Motion to make certain other parties defendants were denied.

This reservation was created and set apart for the benefit of the Crow Indians by treaty of May 7th, 1868 (15 Stat. L. 649). Later on the reservation was diminished by other treaties (22 Stat. L. 42; 26 Stat. L. 1039 and 33 Stat. L. 353, 357.) It is agreed that the present boundaries of the reservation as set forth in the complaint are correct. The work of making allotment of lands to the In-

dians was commenced in 1885, under the Act of April 11th 1882, which ratified the agreement of the Indians submitted June 12th, 1880. Allotments were continued under the Act of February 8th, 1887 (24 Stat. L. 388.) [210]

The Act of Congress of March 3, 1891 (26 Stat. L. 939, 1039) ratified the agreement of December, 1890, with the Crow Indians whereby they ceded a part of the reservation; this agreement provided that any person entitled to the privilege of selecting land in severalty under the provisions of the sixth article of the treaty of May 7th, 1868, (15 Stat. L. 649) should have the right of selection in any part of the ceded strip or portion for a period of sixty days under this agreement.

Allotment work was begun May 28th, 1890, under the general allotment act, and continued in 1901 under the acts of February 8th, 1887 (35 Stat. L. 388) and February 28th, 1891 (26 Stat. L. 794), and as specified in the Act of April 11th, 1882, (1 Kappler Indian Laws & Treaties 195). The quantity of irrigable land to be given each Indian was fixed at forty acres. Plaintiff claims that none of the lands now owned or in control of the defendants were classified as irrigable lands for the reason that none of them were situated under the Crow Irrigation project. That allotments were made in March 1921 under the Act of June 4th, 1920 (41 Stat. L. 571). That under the Act of June 25th, 1910 (36 Stat. L. 855, 856, 859), there was allotted the remaining un-allotted lands, and that the agent classified all the allotted and un-allotted lands in units of forty acres, making one unit of irrigable land under gov-

ernment constructed ditches equivalent to two units of non-irrigable agricultural land and four units of non-irrigable grazing land. That all of the lands owned or controlled by the defendants were classified by the agent, Charles E. Roblin, as grazing or agricultural land, with the exception of portions of three forty-acre tracts owned by the defendant, Antler Land Co., which were classified as irrigable; two of them lie under a proposed ditch known as upper Little Horn No. 1, which has never been constructed, and the third lies partly under the Bozeman Trail Ditch and the above named proposed ditch.

That all of the lands of the defendants are situated within the boundaries of the Crow Indian Reservation in the state of Montana, which were acquired, either by mesne conveyances from the original Indian allottees, or their successors in interest, or by purchase at government sale of deceased allottees' lands, as authorized by the Act of May 8th, 1906 (34 Stat. L. 182; 3 Kappler 181). [211]

The waters diverted by these defendants are from Little Big Horn River or Lodge Grass Creek, or their tributaries. Some of the defendants introduced in evidence notices of appropriation of water under the Montana Statutes from these streams. None of the allotments were approved until March 27th, 1907. The Act of May 8th, 1906, removed the twenty-five year restriction period and allowed patent in fee to issue to the Indian whenever the Secretary of the Interior considered him competent. The Crow Irrigation Project had its beginning in the construction of the Reno ditch in 1884 and 1885,

which was enlarged and extended in 1917. The Act of March 3rd, 1891, was in pursuance of an agreement with the Indians to construct the Crow Irrigation Project with monies due the Crow Tribe for the cession of their right to occupancy of certain tracts of land to the United States. This act gave the Secretary authority to expend $200,000.00 "in the building of dams, canals, ditches and laterals for the purpose of irrigating in the valleys of the Big Horn and Little Big Horn rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper."

May 5th, 1891, a Superintendent of Irrigation was appointed with instructions as follows: "The general plan should include such separate systems as may be necessary to properly irrigate the different portions of the reservation, but the aim to serve the greatest amount of irrigation of Indian lands with the least expense, should be strictly followed."

That the dates of construction and carrying capacities of each government ditch is as follows:

Date of construction	Ditch	Capacity
1885	Reno	85 Cu. ft. per second
1893	Forty Mile	89 " " " "
1893	Lodge Grass No. 1	223 " " " "
1892	Agency	209 " " " "
1904	Lodge Grass No. 2	37 " " " "
1910	Upper Little Horn No. 2	115 " " " "

Surveys were made for the proposed ditches known as Little Big Horn Nos. 1 and 3, but were rejected. That by 1915 the approximate irrigable acreage by means of this project had been determined as follows:

Upper Little Horn No. 2	3248.36 acres
Forty Mile Ditch	1060.42 "
Reno Ditch	3619.13 "
	[212]
Agency Ditch	6149.19 "
Lodge Grass No. 1	4868.38 "
Lodge Grass No. 2	1828.52 "

That the acreage actually irrigated by the said project in the Little Big Horn and Lodge Grass areas from waters of these streams and their tributaries during 1934 was 8084 acres divided among the above units as follows:

Agency Unit	2347 acres
Reno Unit	1696 "
Forty Mile Unit	311 "
Upper Little Horn No. 2 Unit	1783 "
Lodge Grass No. 1 Unit	1132 "
Lodge Grass No. 2 Unit	210 "

That this project is owned jointly by the United States and the Crow Indians. Expenditures for construction to June 30th, 1926, amounted to $1,977,890.10, of which sum, $1,565,235.31 were expended from tribal funds, $139,049.02 from gratuity appropriations and $273,594.77 from reimbursable appropriations.

That the construction of a majority of the private ditches on the reservation began in 1916, and that the construction of all the dams and ditches of the defendants and the diversion of the waters of these streams commenced many years after the construction of each of the government units and after the use of the waters of said streams by the Crow Irrigation Project, so styled, with the exception of the Peters Ditch owned by the defendants, Dethlefsen, which was begun in 1896. That no consent was ever given the defendants to construct their dams and ditches by the plaintiff.

That the Little Big Horn River is an unnavigable stream rising in the Big Horn mountains and flowing in a northerly direction across said reservation, crossing the southern boundaries thereof and emptying into the Big Horn River near Hardin, Montana. That the diversions from the Little Big Horn River are set out on the map introduced by plaintiff as they appear going down stream, as follows:

Tschirgi Ditch.
Upper Little Horn Ditch No. 2 (government).
Bozeman Trail Ditch (private diversion).
Belken-Campbell Ditch. [213]
Forty Mile Ditch (government).
Hennan Ditch.
Reno Ditch (government).
Agency Ditch (government).

The Bozeman Trail Ditch Company diverts the waters of said river for the irrigation of lands

owned by whites and members of the Crow Tribe, under a grant to it by the United States. At the time the agreement was made respecting this grant of authority so to divert the waters aforesaid 1961 acres were owned by the Indians and 858 by the white men. Lodge Grass Creek is a stream rising in the Big Horn mountains and flowing in a northerly direction on the said reservation and emptying into the Little Big Horn River near Lodge Grass, Montana. The diversions made from this creek, going down stream, as shown on the map, are as follows:

Yates Ditch.
Dethlefsen Peters Ditch.
Billie Miller Ditch.
Robert J. Miller Ditch.
Lodge Grass No. 2 (government).
Lodge Grass No. 1 (government).

That the principal diversions of the defendants on each of these streams are made above the government's diversions.

Plaintiff further claims that there was not enough water available during the season of 1934 to successfully irrigate the acreage actually farmed under the said project; that crop losses occurred that year to whites and Indians alike who owned or leased lands under this part of the project, and that such shortage of water was due to a considerable extent to the diversions of the defendants. That in many cases crops were abandoned under the Reno, Agency and Lodge Grass Units. That

there was not enough water during that year to irrigate the Indian-owned lands in that area, nor was there enough water available from 1931 to 1934 inclusive to successfully irrigate the lands then being farmed under the project in this area, and that this was admitted by defendant, M. H. Tschirgi, in charge of the major diversion of the defendant, Antler Land Company. Defendants admit in their answers that they have been diverting the waters of the streams in question for several years, [214] claiming a right thereto for the irrigation of their lands on the theory that each allotment susceptible of irrigation on the Crow Indian Reservation is entitled to its pro-rata share of the waters of streams flowing through or bordering upon said reservation; that this right dates back to the Treaty of May 7th, 1868, and that each acre of irrigable land owned or in the control of the defendants is entitled to the same amount of water as each acre of irrigable land under government constructed ditches. On the other hand, the United States claims the right to exclusively use, regulate and control the waters of these streams for use in its Crow Indian Irrigation Project system without interference or depletion of the supply from any source.

Plaintiff contends that prior to the establishment of this reservation by Treaty of May 7th. 1868 (15 Stat. L. 649) the United States was the absolute owner of the usufruct of all un-navigable waters which it had not already granted to private

persons, and that it has continued to retain such ownership unless by some act of Congress it has granted it to others or estopped itself from asserting it as against those who have been using the waters of these streams and their tributaries under a claim of right.

That the lands in which the defendants claim ownership on this reservation were the original allotments to members of the Crow Tribe, and that upon the death of these original allottees the plaintiff as guardian of their heirs sold the lands at public sale and that the defendants, or their predecessors in interest, became the purchasers, and that the government thereupon issued a patent in fee to the purchasers at such sales containing the following language: "together with all rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging." The patent made no reservation of water or water rights. In some instances fee patents to the lands were issued to the Indians and they in turn conveyed to the defendants; the patents being in the same form as those used in public sales of lands of deceased allottees, and conveying the appurtenances. The Indian patentees conveyed by warranty deed "the premises, together with all tenements, hereditaments and appurtenances"; no water or water rights being reserved therein.

The parties to the suit seem to agree that under the Treaty of [215] May 7th, 1868, the lands on the reservation were recognized as the common property

of the Crow Tribe. Under the interpretation of a like treaty in the Winter's case (207 U. S. 564; 143 Fed. 740) the use of the waters of the streams on the reservation were reserved to the Indians. They were to be instructed in agricultural pursuits and the waters were to be used to irrigate their lands. They were to become farmers and water for irrigation was necessary to mature their crops. The era of dry land farming had not then dawned. Under the Crow treaty the Indian could select his own land. After that came the survey followed by the allotment of the land selected. A twenty five year trust patent was issued to the Indian which finally resulted in a patent in fee; thus he became the owner of the land and the use of water to irrigate it to the extent of forty acres. It seems to be plain that each Indian thereby secured a vested right to the use of sufficient water to irrigate his irrigable land; at any rate, that he would be entitled to his pro rata share of the available water supply for that purpose. Not all of the Indians who had irrigable land were served with water under the government projects but they possessed the right to use. Some constructed their own ditches while others joined in building a common ditch. One Indian was entitled to just as much water as another measured by his needs and the available supply.

It seems to be understood by the parties to the suit that the treaty of May 7th, 1868, determines the rights of the government and the Indians in

respect to the lands and waters here involved, and that it does not appear from any subsequent treaty or act of Congress that such rights have ever been impaired or destroyed. This treaty was in effect a grant by the Indians but certain rights were reserved under the treaty. When the Indians made the treaty with the government they reserved rights to the use of the waters at least to an extent necessary to irrigate their lands, and the rights so reserved continue to exist against the United States and its grantees as well as against the State and its grantees. (Winters v. U. S., 143 Fed. 740), and again to the same effect in U. S. v. Winaus, 198 U. S. 371; Skeem v. U. S. 273 Fed. 95; U. S. v. Hibner, 27 Fed.(2) 911. No question that before and when the treaty was ratified the Indians had control of the land and waters; it was so held in the Winters case in construing a treaty like that of May 7th, 1868 In that [216] case the waters evidently were intended for use on the diminished reservation and Winters had diverted them to lands on the ceded strip, that is, outside of the reservation. (Ft. Belknap Treaty, May 1st, 1888, 25 Stat. 113.)

It was held in Minnesota v. Hitchcock, 185 U. S. 373-389, 46 L. ed. 963: "The fee of the land was in the United States subject to the right of occupancy by the Indians. That fee the government might convey and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would

acquire a perfect and unburdened title and right of possession." Does the water belong to the tribe or the Indians, and if to the latter does it go to the purchaser as something appurtenant to the land. Tribal lands were held in common prior to the general allotment act of February 18th, 1887. There was no ownership in severalty and upon the death of an Indian such rights as he possessed in the use of land and water ceased. Section 7 of the above allotment act provided as follows: "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon such reservation." (24 Stat. 388; 1 Klepper 35.) Clearly the purpose of this statute is to provide for the distribution of water to the individual Indian. A just and equal distribution must be made, and the duty devolving upon the Secretary is to provide the rules and regulations therefor.

The government's theory is that the waters are reserved for the tribe, rather than for the individual Indians, but authorities cited by both sides do not seem to support that theory. (Winters v. U. S. supra; Winters v. U. S., 207 U. S. 564, 28 Sup. Ct. 207; U. S. v. Conrad Inv. Co. 156 Fed. 123, 127; Conrad Inv. Co. v. U. S., 161 Fed. 829; U. S. v. Wightman, 230 Fed. 277; Skeem v. U. S., 273

Fed. 93; U. S. v. Parkins, 18 Fed.(2) 642; U. S. v. Hibner, 27 Fed.(2) 909; Scheer v. Moody, 48 Fed.(2) 327.

In the Hibner case, supra, it was held: "The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of Skeem v. U. S., supra, [217] (273 Fed. 93) and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians."

The case of Mason v. Sams, 5 Fed.(2) 255 is cited by defendants as illustrating the attitude of the court where any discrimination is shown in favor of one Indian as against another, such as the defendants' reference to the claimed right on the part of the Secretary of the Interior to give water to one Indian to the detriment of another, quoting from the regulation: "To provide for the irrigation of the largest quantity of land selected by the Indians for allotment or likely to be selected by them at the least expense." Defendants assert this plan was not carried out, but that irrespective of expense the government has attempted to furnish water to one piece of land and not to another which is equally entitled to it. In Mason v. Sams, above, under the Treaty of 1855 with Quinaielt or Taholah Indians, it was held the right to fish was common to all members of the tribe, and that the Secretary

was without authority to make regulations under which particular locations on Quinaielt River were assigned to individual members with exclusive rights therein, and requiring them to pay royalty on fish sold for the benefit of other members of the tribe. The point is made that regulations granting to certain members of the tribe the right to use the waters of the Little Big Horn River to the exclusion of other members is a similar usurpation of power. In Scheer v. Moody, supra, referring to rights of private ditches on the Flathead Indian Reservation, Judge Borquin held: "Immaterial is it also whether or not the allottees' appropriation of the waters was pursuant to rules by the Secretary prescribed as authorized by the Act of 1887 aforesaid. The Statute vests discretion in the Secretary, is not mandatory, and is intended to restrict the recognized right of appropriations only so far as in the judgment of the Secretary its exercise in absence of controlling rules would work injustice. Rules or not, the Indians' necessities were as great, their right to appropriate water no less, save to the extent exercised inequitably, and as before noted, the Indians' appropriations of water were known to, sanctioned by, and [218] acquiesced in by the Secretary, more effective than any of his rules and for which he perceived no necessity."

It does not seem to be of great importance whether one government irrigation works on the reservation are considered one system or several

systems or projects. The Commissioner refers to systems in his letter to Graves. If the use of water was to be limited to the government irrigation system or systems, then defendants enquire how can it justify its course in granting water to lands owned by the whites under the Bozeman Trail Ditch, which was a private ditch. The Indians gave the Secretary permission to construct irrigation ditches with tribal money but they did not authorize him to use or withhold the use of water in respect to any particular piece of land or any particular Indian.

Article VI of the Crow Treaty of 1868, hereinbefore referred to, is strongly relied upon as authority for the claim on the part of the government that the Indian did not have a right in perpetuity nor in fee simple absolute to the water right used in connection with the lands allotted to and occupied by him; that "a right to a life estate of a limited kind" is all that he received; that he and his family could use the water upon the allotment only so long as he or they may continue to cultivate it; that upon the death of the Indian or his heirs the right as user returned to the government. To this contention counsel for the defendants Dethlefsen make the following pertinent reply: "If that be so, then the white farmers under the Bozeman Trail Ditch, as well as under all government ditches, have no water rights. Under their theory the Indian would have the land and a water right for it only so long as he or his heirs possessed and con-

tinued to cultivate it. No conveyance from an Indian of any land and water right owned by him to a white person would entitle the white owner to use any water for irrigation. The proof shows very few acres of land in the Little Big Horn and Lodge Grass Valleys were cultivated by Indians in 1934. Under their theory of the case and interpretation of Article VI, no white men owning land on the reservation and under a government ditch had any more right to the use of water from the river or creek, or their tributaries, than had any of the defendants in this case. We are also of the opinion that the rule would extend to white men leasing Indian lands. If the contention of counsel is correct, then the Indians in [219] possession and actually cultivating their land have the only prior rights to the waters of the Little Big Horn River, Lodge Grass Creek, and their tributaries. If white men acquired no water rights by purchase of Indian land, whether irrigated or not before sale, then the water rights as between the white men must be determined under the water right laws of Montana. In that case these defendants would have the first right after the Indians actually cultivating their own lands are supplied with sufficient water."

Counsel further contends that if the above theory of the case is correct that they have stated themselves out of court as no showing has been made as to the amount of water required by Indians actually cultivating their own lands after July 1, 1934. But it further appears under that same

article VI of the treaty that the government issued fee simple patents, conveying the lands and "all rights, immunities, privileges and appurtenances of whatsoever nature thereunto belonging." Such was the conveyance to Mrs. Peters and her children who subsequently conveyed in like manner to the defendants Dethlefsen, while the lands were being occupied and cultivated by them. Such was substantially the terms of the conveyances to all other answering defendants herein. The basis for such action on the part of the government is found in the last paragraph of Article VI which reads as follows: "The President may at any time order a survey of the reservation and when so surveyed Congress shall provide for protecting the rights of the settlers in their improvements and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof as may be thought proper." So many authorities have so held that it may be accepted as a rule of law that the conveyance of land with its appurtenances, where no different intention is expressed, conveys the water right used to irrigate such land.

In U. S. v. Oregon, 295 U. S. 1, 27, 27; 55 Sup. Ct. 610, 621, the court said: "It is true as specifically pointed out in Oklahoma v. Texas, supra, 594, 595, that the disposition of such lands is a

matter of the intention of the grantor, the United States, and if its intention be not otherwise shown it will be taken to have assented that its conveyance should be construed and given effect in this particular [220] according to the law of the state in which the land lies. This was the effect of the decisions in Hardin vs. Jordan, supra; Mitchell v. Smale, 140 U. S. 406; and Kean v. Calumet Canal Co., 190 U. S. 452, in which conveyances bounded upon the waters of a non-navigable lake were, when construed in accordance with local law, held impliedly to convey to the middle of the lake * * * In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted." See also Packer v. Bird, 11 Sup. Ct. 210, 211, 212; 137 U. S. 661. Montana cases relating to the rule on conveyances of land with the appurtenances follow: Tucker v. Jones, 8 Mont. 225; Sweetland v. Olson, 11 Mont. 27; Beatty v. Murray P. M. Co., 15 Mont. 314; McDonald v. Tannen, 19 Mont. 78; Sloan v. Glancy, 19 Mont. 70; Smith v. Denniff, 23 Mont. 65; Kofoed v. Bray, 220 Pac. 532.

In Morrow v. U. S. 243 Fed. 854, 856, the Circuit Court of Appeals for the 8th Circuit held: "There is no question that the government may, in its dealings with the Indians, create property rights, which, once vested, even it can not alter. Williams v. Johnson, 239 U. S. 414, 420, 60 L. Ed. 358; Sise-

more v. Brady, 236 U. S. 441, 449, 59 L. Ed. 308; Choate v. Trapp, 224 U. S. 665, 56 L. Ed. 941; English v. Richardson, 224 U. S. 680, 56 L. Ed. 949; Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49; Chase v. U. S., 222 Fed. 593, 596. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian." Also see U. S. v. Chase, 245 U. S. 89.

The Winters case, relied upon by plaintiff, seems to present a different state of facts from that involved here. (Winters v. U. S., 143 Fed. 740, 207 U. S. 564.) There the white landowners claimed the superior right to the waters of Milk River by appropriation under the desert land act of March 7, 1877, (19 Stat. 377, amended 26 Stat. 1096). Such waters were being used on lands outside the reservation. But it appears that the government and the Indians had diverted 11,000 inches of water from this river long before any diversion by Winters. In the [221] present case the waters of the reservation have not been diverted from the lands for which they were intended according to the rule laid down in the Winters case. But again the government contends that the Indian is entitled only to such amount of water as is required for the land he resides upon and cultivates. Here the

defendants rely upon the doctrine of the Hibner case from the Ninth Circuit, District of Idaho (27 Fed. (2d) 909). In this case the Bannock Indians had made selections and were allotted lands on the reservation under Articles VI and XI of the Fort Bridges Treaty of June 3rd, 1868, 15 Stat. 649, which are the same articles and bearing the same numbers as in the Crow Treaty of May 7th, 1868. The contention there was that the Indians were entitled only to such amount of water as they had actually put to a beneficial use and that they had no water right except as made by appropriation in the same manner as such right was acquired by white men. The Indians and their successors, the white men, claimed that their rights did not depend upon occupancy or possession of the lands but was granted to the Indians by the treaty of July 3rd, 1868. In reply it was asserted that if the Indians had any rights to water under that treaty they lost them because of failure to reside upon the lands; that even if they had not lost their rights, by the strict terms of the treaty they were entitled only to such amount of water as was necessary to irrigate the lands actually cultivated and in use. The court disposed of these opposite views in the following language: "The status of the water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians, because the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands does not prevail and apply to the white man, and the reason

for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he became the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to [222] him, under the doctrine of relation, the same priority as owned by the Indians; otherwise, the application of any other rule would permit such grantee for an indefinite period to reclaim the balance of his land and withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands," * * * "The Indians whose rights are asserted by the Government in the present suit have elected to retain as their allotments the lands in question, which are within the tract ceded to the United States, and in the reservation, and are adapted to the raising of hay and grain thereon. Water from Toponce Creek has and is now being used upon a portion of their lands in the production of wild hay. The defendants who are contesting the rights of the Indians urge that even such rights as may have been reserved to these allottees under articles VIII have been lost through their failure since that date to reside on their lands,

and further they say that, even if that be not true, by the express terms of the treaty the exception to the grant is limited to such amount of water as is necessary for irrigating the lands actually cultivated and in use. This extreme view is thought to be untenable, as the effect of the treaties was to recognize and fix permanently the rights that the Indians had at the time the treaties were made, which was to a continuous use of a sufficient amount of water for the irrigation of their lands, and domestic purposes."

In that case the court granted to the Indian land a water right with priority as of the date of the ratification of the Fort Bridger Treaty. This rule applied to the defendants in this case seems to be fair and equitable and affords protection both to Indians and white men, and furthermore the facts there are very much like the facts in the instant case and were governed by like treaty provisions. From a perusal of the transcript of the testimony it seems to the court that these answering defendants upon receiving title from the Indian were reasonably diligent in placing under irrigation such portions of the land granted to them as were susceptible of irrigation. Some of the same questions presented here were decided by this court in U. S. v. Heinrich, 12 F.(2d) 938, especially referring to like patents and vested rights.

The numerous acts of Congress appropriating large sums of money [223] for the purchase of water rights on Indian Reservations covering a period of many years would seem to indicate that

Congress and the Interior Department have not always adhered to the doctrine laid down in the Winters case but have been controlled to a great extent by the facts as they appeared to be in each particular instance. The government permitted white landowners on the Crow reservation to acquire valuable water rights in the Little Big Horn River in its contract with Bozeman Trail Ditch Company. Counsel have furnished the court with lengthy quotations from Scheer v. Moody, 48 Fed. (2) 327, because of its apparent applicability to some of the principal questions involved in the present case, which have been given consideration in connection with other authorities, treaties, statutes and regulations. The plaintiff complains that to allow the defendants the same water right the court has held his Indian predecessor in interest was entitled to will result in a deplorable situation respecting the various irrigation systems on the Crow Indian reservation and practically defeat the purposes for which they were constructed, but has not made it clear just how it will occur. The white man can acquire no greater or better right than the Indian himself possessed, and if the Indian had not conveyed his interests the right would have remained in him, and such water as he needed for irrigation might have been used by him, depending upon the available supply and the needs of others who possessed rights of equal standing. What difference does it make so far as the actual taking of the water is concerned whether the Indian retained it, turned it over to a lessee, as many have done, or sold it to

the white man. Here was a small piece of land that could be irrigated with an appurtenant water right for that purpose. How can it wreck the systems on the reservation if the white man is permitted to stand in the shoes of his Indian grantor, or acquires the right at sales of deceased Indian allotments?

If the facts here were the same as in the Winters case and the whites were taking the water under the desert land act, applying it to lands outside of the reservation and claiming superior rights to the Indians who had long prior to the advent of these desert land entrymen appropriated and used the waters of the stream in question, then it can be well understood how the Indians and their guardian might have cause to complain that their rights were being impaired, and how the great expenditure of money on irrigation works might go for naught if the [224] entrymen should prevail in their suit and succeed in establishing a water right superior to the Indians. If the white men because of their advantageous position higher up the stream should deprive the Indians or their lessees lower down of their proportionate share of the waters flowing therein then an efficient remedy is available to restrain the commission of such unlawful acts.

Another question urged as one of pressing importance, because of the weight of the testimony given by men of learning and experience, related to the amount of water necessary properly to irrigate an acre of land. Counsel claim, and the claims seem to be well supported by the evidence that the old rule of one inch per acre, adopted when

irrigators were few and water was plentiful, should no longer be accepted as the standard guide on that subject. Considering the character of the proof submitted at the hearing on the duty of water the court is convinced that one inch per acre is excessive and that one half inch is ample for the successful irrigation of crops; and that means the so-called one half miner's inch per acre delivered upon the land to be irrigated.

Wherefore the court finds the issues herein in favor of the defendants in accordance with their respective claims as set forth in their answers, and relief will be awarded accordingly. Counsel will prepare and present proper findings, conformably with the views herein expressed. Such findings to be brief and based only upon ultimate facts.

CHARLES N. PRAY

Judge

Jul. 29, 1936.

[Endorsed]: Filed July 29, 1936. [225]

Thereafter, on August 6th, 1936, an Order extending time for Statement of the Evidence herein was duly filed and entered herein, in the words and figures following, to-wit: [226]

[Title of Court and Cause.]

ORDER

For good cause shown IT IS HEREBY ORDERED that the plaintiff, United States of America, may have and is hereby granted ninety days from this date in which to prepare, serve and file

its bill of exceptions or statement of the evidence herein.

IT IS FURTHER ORDERED and this does order that the term of court is hereby extended to and including the date of the final settlement by the court of such bill of exceptions or statement of the evidence.

Dated this 6th day of August, 1936.

CHARLES N. PRAY
Judge

[Endorsed]: Filed Aug. 6, 1936. [227]

Thereafter, on August 11, 1936, plaintiff filed herein its Motion for supplementary findings of fact, with proposed supplementary findings attached thereto, in the words and figures following, to-wit: [228]

[Title of Court and Cause.]

MOTION

Now comes the plaintiff in the above stated cause and respectfully moves the court to make and enter the attached findings of fact, supplementary to the original findings of fact heretofore submitted by the plaintiff.

R. LEWIS BROWN
Assistant United States Attorney,
District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department of
the Interior, U. S. I. I. S. [229]

[Title of Court and Cause.]

SUPPLEMENTARY FINDINGS OF FACT

XIV.

That all of the lands owned or controlled by the defendants, described in the bill of complaint on file herein, were classified by the Allotting Agent Charles E. Roblin, pursuant to instructions of the Secretary of the Interior under authority vested in him by the Act of Congress of June 25, 1910 (36 Stat. L. 859; III Kappler, Indian Laws and Treaties, 476, 480), as grazing or agricultural land, with the exception of portions of three forty-acre tracts owned by the defendant, Antler Land Company, which were classified as irrigable.

[Endorsed]: Filed August 11, 1936. [230]

Thereafter, on September 16, 1936, defendants Dethlefsen filed herein their Proposed Findings of Fact and Conclusions of Law, in the words and figures following, to-wit: [231]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the admissions in the pleadings, admission of counsel made in open court and the evidence, the court makes the following findings of fact in the above cause:

I.

All of the lands owned or leased by the defendants are situated within the boundaries of the Crow Indian Reservation in the State of Montana.

II.

All of said lands were acquired by the defendants, or their lessors, or by the predecessors in interest of the defendants or of their lessors, either by mesne conveyances from the original Indian allottees or by purchase at government sales of deceased Indian allottees' lands.

III.

Under Section VI of the Crow Indian Treaty of 1868, patents in fee simple were issued by the Government to all of the lands in question, which patents contain the following language: [232] "Together with all rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging." In none of said patents was there any reservation of water or water rights. The Indian patentees conveyed to said defendants, or their lessors, or their predecessors in interest, by warranty deeds conveying "the premises, together with all tenements, hereditaments and appurtenances." Deeds from purchasers at such government sales to said defendants, or their lessors, or their predecessors in interest, contained the same words with reference to what was conveyed. No water nor water rights were reserved in any of said deeds.

IV.

The Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896.

V.

Plaintiff, through its agents and officials on the Crow Indian Reservation, aided the said Peters family in the construction of their said ditch by furnishing the necessary lumber for the head gate for said ditch and by framing said lumber for said head gate and thereby the Peters appropriation of water of Lodge Grass Creek was known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs.

VI.

The said Peters appropriation of water was made before some of the irrigation projects of the government on said Reservation were begun and before the others were completed.

VII.

The Crow Indians gave the Secretary of the Interior permission to construct irrigation ditches with tribal money but they did not authorize him to use or withhold the use of water in respect to any particular piece of land or any particular Indian. [233]

VIII.

Prior to 1910 all non-irrigable lands on the Crow Indian Reservation were classified as grazing land so far as such classification had progressed. Prior to that date all lands classified as agricultural were irrigable. Dry land farming, prior to that date, was not practiced on the Crow Indian Reservation or, for that matter, in the State of Montana so only irrigable lands were considered as agricultural lands.

IX.

Each of the defendants, or his lessor, or the predecessors in interest of such defendant or of his lessor, used reasonable diligence in placing his land under irrigation or in increasing the acreage thereof under irrigation after he acquired title thereto and has since then continuously irrigated the same.

X.

One-half miners' inch of water per acre at the point of delivery on the irrigated land is sufficient for the proper irrigation of the lands belonging to the defendants, or leased by them, and belonging to the Crow Indians which are irrigable from the Little Big Horn River and Lodge Grass Creek and their tributaries.

Based upon the foregoing findings of fact, the statutes and codes of the United States and the decisions of the Federal courts, the court makes the following conclusions of law:

I.

The Crow Indians, in their treaty with plaintiff in 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries at least to an extent necessary to irrigate all lands irrigable from such streams, or any of them. The rights so reserved continued to exist against the United States and in favor of individual [234] Indians and their grantees and successors in interest and the grantees in the aforesaid governmental sales and their successors in interest.

II.

The purpose of the allotment act of February 18, 1887, was to provide for the distribution of water to individual Indians. A just and equal distribution must be made and the duty devolved upon the Secretary of the Interior to provide rules and regulations therefor. The waters upon the Reservation were reserved for the individual Indians and not for the Crow Tribe of Indians.

III.

Under the treaty of May 7, 1868, and under the patents issued by the Government, each member of the Crow Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of forty acres. Subject to that limitation of acreage, each irrigable acre is entitled to the same amount of water as any other acre on the Crow Indian Reservation. In case of shortage of water, he is entitled to his pro rata share of the

available water whether his land is under a government ditch or not.

IV.

It is the law in Montana, and apparently in all states where irrigation is practiced, and accepted by the Federal courts as a rule of law, that the conveyance of land with its appurtenances, where no definite intention to the contrary is expressed, conveys the water right used to irrigate such land.

V.

The defendants, as owners and as lessors of the lands in question, have the same vested right to the use of the waters of said river, creek and their tributaries in the irrigation of their said lands as their and their lessors' Indian predecessors in interest had before the alienation of such land. [235]

VI.

The purchaser of such lands, either from the Indian allottee or at such government sales, acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantors.

VII.

The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters of said river, creek and their tributaries to the exclusion of other members is an usurpation of power and illegal.

VIII.

Each defendant is entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indian allottee by his deed or from the plaintiff at such sales of deceased Indian allotments and such increased acreage as the defendant, or his lessor, or his or his lessors' predecessors in interest, may have placed under irrigation with reasonable diligence after securing title to such land.

IX.

Each defendant is entitled to one-half miners' inch of water per acre delivered on his land to the extent of not more than forty acres for each Indian's allotment or his proportionate share thereof whenever there may be a shortage of water from said river, creek or their tributaries.

X.

Because of the aid furnished by plaintiff's agents and officials on the Crow Indian Reservation to the Peters family in furnishing and framing the necessary lumber and timbers for the head gate for the Peters ditch, the legal presumption follows that such aid was with the consent, knowledge and acquiescence of the Secretary of the Interior. [236]

XI.

The court finds the issues herein in favor of the defendants, and each of them, in accordance with their respective claims as set forth in their answer and relief will be awarded accordingly.

XII.

As plaintiff failed to make out a cause of action against said defendants, or any one of them, plaintiff is entitled to no relief herein.

XIII.

Costs herein are awarded as follows:

XIV.

Let decree be entered in accordance with these findings and conclusions.

Done in open court....., 1936.

.....

Judge.

[Endorsed]: Filed Sept. 16, 1936. [237]

Thereafter, on September 16, 1936, defendants M. H. Tschirgi, et al., filed herein their Proposed Findings of Fact and Conclusions of Law, in the words and figures following, to-wit. [238]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

Based upon the admissions in the pleadings and of counsel made in open court upon the trial of said cause and upon the evidence submitted and the proof adduced therefrom, the Court makes the following

FINDINGS OF FACT

1. Neither M. H. Tschirgi nor Bertha Tschirgi, defendants, are in possession of nor have any control over the lands described in plaintiff's bill of complaint, and neither of said defendants have diverted or used any of the waters of the Little Big Horn River.

2. The lands owned, or leased, by the defendants, Antler Land Company, a Montana corporation, B. B. Belken, Edith C. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller, are former allotments to members of the Crow Tribe of Indians and situated within the boundaries of the Crow [239] Indian Reservation, in the State of Montana, as diminished.

3. That each of the above named defendants is the owner of the fee title, or a lessee in possession under valid and subsisting lease from the owner of the fee title, of the lands described in the answer such defendants.

4. All of said lands were acquired by the defendants, or their lessors, or by the predecessors in interest of the defendants or of their lessors, either by mesne conveyances from the original Indian allottees or by purchase at government sales of deceased Indian allottees' lands.

5. Under Section VI of the Crow Indian Treaty of May 7, 1868, patents in fee simple were issued by the Government to all of the lands in question, which patents contain the following language: "Together with all rights, privileges, immunities and

appurtenances of whatsoever nature thereunto belonging." In none of said patents was there any reservation of water or water rights. The Indian patentees conveyed to said defendants, or their lessors, or their predecessors in interest, by warranty deeds conveying "the premises, together with all tenements, hereditaments and appurtenances." Deeds from purchasers at such government sales to said defendants, or their lessors, or their predecessors in interest, contained the same words with reference to what was conveyed. No water nor water rights were reserved in any of said deeds.

6. That in each instance, after the issuance and delivery of said patents in fee, either the defendants themselves, or their predecessors in interest, or the predecessors in interest of defendants' lessor proceeded with reasonable diligence and constructed irrigation ditches through which said defendants or said predecessors conveyed water from the Little Big Horn River or Lodge Grass Creek, being unnavigable streams flowing within the boundaries of said Crow Indian Reservation, to, over and upon parts or portions of [240] the irrigable lands contained within the above mentioned former Indian allotments. That ever since then said predecessors, defendants' lessors and the above named defendants have conveyed water from the Little Big Horn River or Lodge Grass Creek through said irrigation ditches to and upon said lands and have continuously irrigated said lands with the water so conveyed; and with the aid of such irrigation and proper cultivation, have raised grass, hay, grains and other crops thereon.

7. One-half miners' inch of water per acre at the point of delivery on the irrigated land is sufficient for the proper irrigation of the lands belonging to the defendants and the Crow Indians which are irrigable from the Little Big Horn River and Lodge Grass Creek and their tributaries.

8. Prior to 1910 all non-irrigable lands on the Crow Indian Reservation were classified as grazing land so far as such classification had progressed. Prior to that date all lands classified as agricultural were irrigable. Dry land farming, prior to that date, was not practiced on the Crow Indian Reservation or, for that matter, in the State of Montana so only irrigable lands were considered as agricultural lands.

9. The instructions of the Secretary of the Interior to United States Special Allotting Agent, Charles E. Roblin, were to make allotments to only such Indians as were living on December 4, 1920. Only three of the Indians whose allotments comprised the lands of the defendant Antler Land Company were living on December 4, 1920. The said Charles E. Roblin made no classification of the lands of the deceased Indians as to being "irrigable," "non-irrigable," "agricultural" or "grazing" lands, but the said allotting agent did classify the lands of the living Indians, and such portions of the living Indians' land, as had a similar status to the lands of the Antler Land Company, affected by this action, were classified as "irrigable." [241]

10. The Secretary of the Interior duly approved the allotments made by Special Alloting Agent,

Charles E. Roblin, wherein the said three tracts were classified as irrigable.

11. The Crow Indians gave the Secretary of the Interior permission to construct irrigation ditches with tribal money but they did not authorize him to use or withhold the use of water in respect to any particular piece of land or any particular Indian.

12. The Secretary of the Interior has made no rules or regulations for a division of the waters of the Crow Indian Reservation among the various individual Indians or the various individually allotted tracts of land within said Reservation.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1. Plaintiff has failed to establish a cause of action herein against M. H. Tschirgi and Bertha Tschirgi who were improperly joined as party defendants.

2. The defendants, M. H. Tschirgi and Bertha Tschirgi, are entitled to a decree of this Court dismissing this cause of action as to them.

3. The Crow Indians, in their treaty with plaintiff in 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries at least to an extent necessary to irrigate all lands irrigable from such streams, or any of them. The rights so reserved continued to exist against the United States and in favor of individual Indians and their grantees and

successors in interest and the grantees in the aforesaid governmental sales and their successors in interest.

4. The purpose of the allotment act of February 18, 1887, was to provide for the distribution of water to individual Indians. [242] A just and equal distribution must be made and the duty devolved upon the Secretary of the Interior to provide rules and regulations therefor. The waters upon the Reservation were reserved for the individual Indians and not for the Crow Tribe of Indians.

5. Under the treaty of May 7, 1868, and under the patents issued by the Government, each member of the Crow Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of forty acres, and such vested right has a priority of May 7, 1868. Subject to that limitation of acreage, each irrigatable acre is entitled to the same amount of water as any other acre on the Crow Indian Reservation. In case of shortage of water, it is entitled to its pro rata share of the available water whether his land is under a government ditch or not.

6. In Montana the conveyance of land with its appurtenances, where no definite intention to the contrary is expressed, conveys the water right used to irrigate such land.

7. The defendants, as owners and as lessors of the lands in question, have the same vested right to the use of the waters of said river, creek and their tributaries in the irrigation of their said lands as their and their lessors' Indian predecessors in

interest had before the alienation of such land.

8. The purchaser of such lands, either from the Indian allottee or at such government sales, acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantors.

9. The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters of said river, creek and their tributaries to the exclusion of other members is an usurpation of power and illegal. [243]

10. Each defendant is entitled to a water right to the extent of one-half miners' inch of water per acre delivered on said land, for the actual acreage that was under irrigation at the time title passed from the Indian allottee by his deed or from the plaintiff at such sales of deceased Indian allotments and such increased acreage as the defendant, or his lessor, or his or his lessors' predecessors in interest, may have placed under irrigation with reasonable diligence after securing title to such land.

11. The court finds the issues herein in favor of the defendants, and each of them, in accordance with their respective claims as set forth in their answer and relief will be awarded accordingly.

12. As plaintiff failed to make out a cause of action against said defendants, or any one of them, plaintiff is entitled to no relief herein.

13. Costs herein are awarded as follows:

14. Let decree be entered in accordance with these findings and conclusions.

Decision incorporated.

Done in open court_____, 1936.

_____

Judge.

[Endorsed]: Filed as proposed Sept. 16, 1936. [244]

Thereafter, on September 16th, 1936, the answering Defendants' Objections to Plaintiff's Proposed Findings & Conclusions, were duly filed herein, in the words and figures following, to wit: [245]

[Title of Court and Cause.]

ANSWERING DEFENDANTS' OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, PROPOSED BY PLAINTIFF.

COMES NOW, The Answering Defendants, by and through their Attorneys of record, and file and enter the following Objections and Exceptions to the Proposed Findings of Fact and Conclusions of Law of the Plaintiff upon the following grounds:

1.

The Proposed Findings of Fact, and each and every one thereof, do not conform to the evidence or exhibits introduced upon the trial of said cause and are not true and correct Findings of Fact in any particular.

2.

The Proposed Conclusions of Law, and each an every one thereof, are not true and correct inter pretations of the Federal statutes, the Montana stat utes, and the various Treaties between the Crow tribe of Indians and the United States of America and are not based upon the facts introduced. [246

In lieu thereof, the Answering Defendants submi and propose the original Findings of Fact and Con clusions of Law submitted by these Defendants and also the supplemental Findings of Fact and Con clusions of Law submitted upon the request of th Court.

Respectfully submitted,
JOHNSTON, COLEMAN & JAMESON,
T. H. BURKE,
E. N. COLLINS,
BEN HARWOOD,
By T. H. BURKE,
Attorneys for all Answering Defendants.

[Endorsed]: Filed Sept. 16, 1936. [247]

Thereafter, on September 16th, 1936, Plaintiff' Objections to the Findings and Conclusions propose by defendants Yates, were filed herein, in the word and figures following, to-wit: [248]

[Title of Court and Cause.]

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS F. L. YATES AND EMMA E. YATES.

Comes now the plaintiff, by and through its attorneys of record, and files and enters the following objections and exceptions to the proposed Findings of Fact and Conclusions of Law of the defendants, F. L. Yates and Emma E. Yates:

I.

Plaintiff has no objections or exceptions to Paragraphs 1, 2, 4, 6, 7, 8, 9, 10, and 12 of said proposed Findings of Fact.

II.

Plaintiff objects and excepts to Paragraph 3 of said proposed Findings of Fact in that plaintiff contends the waters of streams of the reservation were never reserved for the lands of the allottee, Back Bone, and the reserved waters of said streams were never vested in said allottee; that the said Lulu L. McClure and the said defendants, F. L. Yates and Emma E. Yates, only acquired the rights said allottee had without any reservation in said allottee of the right to the use of any of the waters of the streams flowing through the Crow Indian Reservation. [249]

III.

Plaintiff objects and excepts to Paragraph 5 of said proposed Findings of Fact in that the filings

made for appropriation of the waters of Percheron Creek under State law are immaterial to any of the issues involved in this case and were so held to be immaterial in the opinion of the Court heretofore rendered.

IV.

Plaintiff objects and excepts to each and every Conclusion of Law submitted by said defendant in Paragraphs 1, 2, 3, 4, and 5, therein, for the reason they are not correct interpretations of federal statutes and treaties involved in this case.

V.

Plaintiff objects and excepts to Paragraph 5 of the proposed Conclusions of Law in that the facts therein stated are not in conformity with the opinion of the Court heretofore entered; that on page 7 of the opinion of the Court, it is expressly stated:

"It seems to be plain that each Indian thereby secured a vested right to the use of sufficient water to irrigate his irrigable land; at any rate, that he would be entitled to his pro rata share of the available water supply for that purpose"

Respectfully submitted,

R. LEWIS BROWN,
First Assistant United States Attorney.

KENNETH R. L. SIMMONS,
District Counsel, Department of the Interior, U. S. I. I. S.
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 16, 1936. [250]

Thereafter, on September 16, 1936, Plaintiff's Objections to the Findings and Conclusions proposed by defendants Dethlefsen, were filed herein, in the words and figures following, to-wit: [251]

[Title of Court and Cause.]

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS NICKELS DETHLEFSEN AND MARY DETHLEFSEN.

Comes now the plaintiff, by and through its attorneys of record, and files and enters the following objections and exceptions to the proposed Findings of Fact and Conclusions of Law of the defendants, Nickels Dethlefsen and Mary Dethlefsen:

I.

Plaintiff has no objections or exceptions to Paragraphs 1, 2, 3 and 4 of the said proposed Findings of Fact of said defendants.

II.

Plaintiff objects and excepts to Paragraph 5 of said proposed Findings of Fact in that the testimony taken at the trial of this cause does not disclose that the plaintiff, the United States of America, ever aided the said Peters family in the construction of their irrigation ditches in any manner; that whatever acts were done by Government officials were

without authority or permission of the plaintiff, the United States of America. [252]

III.

Plaintiff objects and excepts to Paragraph 6 of said proposed Findings of Fact in that it is immaterial to any of the issues involved in this cause, and for the further reason that the statements therein contained do not conform to the testimony introduced at the trial of this cause.

IV.

Plaintiff objects and excepts to Paragraph 7 of said proposed Findings of Fact for the reason that the statements therein contained do not conform to the evidence or exhibits before the Court, nor the provisions of the Act of Congress of March 3, 1891, which enacted into law the Treaty of December 8, 1890, between the United States of America and the Crow tribe of Indians, and gave the Secretary of Interior ample power and authority to equitably distribute the waters of the streams of the reservation and to designate the lands of said reservation which were to receive water deliveries from the Crow Indian Reservation Project System.

V.

Plaintiff objects and excepts to Paragraph 8 of said proposed Findings of Fact for the reason that the statements contained therein do not conform to the evidence and exhibits introduced at the trial of this cause; that the records clearly show that no

lands on the Crow Indian Reservation were ever classified by any Government agents as irrigable until classifications were made by Allotting Agent Charles E. Roblin pursuant to instructions of the Secretary of Interior in accordance with the Act of Congress of June 25, 1910.

VI.

Plaintiff objects and excepts to Paragraph 9 of said Proposed Findings of Fact in that the statements therein contained as to reasonable diligence do not conform to the evidence [253] introduced at the trial of this cause.

VII.

Plaintiff objects and excepts to Paragraph 10 of said proposed Findings of Fact in that the statements therein contained do not conform to the testimony of witnesses at the trial of this cause.

VIII.

Plaintiff objects and excepts to each and every Conclusion of Law submitted by said defendants in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 contained therein, for the reason that they are not correct interpretations of Federal statutes. Montana law and Treaties between the Crow tribe of Indians and the United States duly enacted into law, involved in this case.

Plaintiff further objects for the reason that said Conclusions of Law set forth in the paragraphs herein enumerated are not in conformity with the opin-

ion of the court heretofore entered.

Respectfully submitted,

R. LEWIS BROWN,

Assistant United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS,

District Counsel, U. S. I. I. S.,

Department of the Interior,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 16, 1936. [254]

Thereafter, on September 16, 1936,

PLAINTIFF'S OBJECTIONS TO THE FINDINGS AND CONCLUSIONS PROPOSED BY DEFENDANTS TSCHIRGI, ET AL.,

were filed herein, in the words and figures following, to-wit: [255]

[Title of Court and Cause.]

Comes now the plaintiff, by and through its attorneys of record, and files and enters the following objections and exceptions to the proposed Findings of Fact and Conclusions of Law of the defendants, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith C. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller:

I.

Plaintiff has no objections or exceptions to Paragraphs 1, 2, 3, 4 of said proposed Findings of Fact of said defendants. Plaintiff objects to the statement in Paragraph 5 that there was no reservation in the patents of water or water rights as said statement is not a finding of fact but an erroneous conclusion of law.

II.

Plaintiff objects and excepts to Paragraph 6 of said proposed Findings of Fact in that the statement of defendants to the effect that "either the defendants themselves, or their [256] predecessors in interest, or the predecessors in interest of defendants' lessors, proceeded with reasonable diligence" in the construction of irrigation ditches and in the application of water through said ditches to beneficial use upon the lands, is not supported by either the evidence introduced during the trial of this cause or by exhibits before the Court.

III.

Plaintiff objects and excepts to Paragraph 7 of the proposed Findings of Fact of said defendants in that the statements therein contained are supported neither by the evidence nor the exhibits before the Court.

IV.

Plaintiff objects and excepts to Paragraph 8 of said proposed Findings of Fact for the reason that the evidence clearly shows that no lands prior to 1910, or in fact prior to the date that Allotting Agent Charles E. Roblin first classified lands on the

Crow Reservation, were classified by any allotting agent as irrigable, located on said Crow Indian Reservation.

V.

Plaintiff objects and excepts to Paragraph 9 of said proposed Findings of Fact in that the statements contained therein do not conform to the evidence introduced during the trial of said cause or to any of the exhibits before the court, which disclose that the lands of heirs of deceased allottees were classified by Allotting Agent Charles E. Roblin pursuant to instructions of the Secretary of the Interior made in accordance with applicable Federal statutes.

VI.

Plaintiff objects and excepts to Paragraph 10 of said proposed Findings of Fact in that the statements contained therein do not conform to the evidence or exhibits before the Court; the evidence and exhibits before the Court discloses that only portions of the three tracts mentioned therein were [257] classified by said Allotting Agent as irrigable.

VII.

Plaintiff objects and excepts to Paragraphs 11 and 12 of the proposed Findings of Fact for the reason that they do not conform to the evidence or the exhibits before the Court; that the Act of Congress of March 3, 1891, which enacted into law the Treaty of December 8, 1890, between the United States of America and the Crow tribe of Indians, gave the Secretary of Interior ample power and

authority to equitably distribute the waters of the streams of the Reservation and to designate the lands of said Reservation which were to receive water deliveries from the Crow Indian Reservation Project System.

Plaintiff further objects and excepts to the statements made in these two paragraphs for the reason that the evidence and exhibits before the court in this cause clearly set out rules and regulations for a division of the waters of the streams on the Crow Indian Reservation among the various individual Indians and to the various individually allotted tracts of land within said reservation classified by Allotting Agent Roblin as irrigable.

VIII.

Plaintiff has no objection or exception to Paragraphs 1 and 2 of the Conclusions of Law of said defendants.

IX.

Plaintiff objects and excepts to each and every Conclusion of Law submitted by said defendants in Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 contained therein for the reason that they are not correct interpretations of Federal statutes, Montana law and Treaties between the Crow tribe of Indians and the United States duly enacted into law, involved in this case.

Plaintiff further objects for the reason that said [258] Conclusions of Law set forth in the paragraphs herein enumerated are not in conformity

with the opinion of the Court heretofore entered.

Respectfully submitted,

R. LEWIS BROWN
Assistant United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S., Department of the Interior.
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 16, 1936. [259]

Thereafter, on September 16, 1936, the Plaintiff filed herein its motion for supplementary findings, with proposed supplementary findings annexed thereto, in the words and figures following, to-wit: [260]

[Title of Court and Cause.]

MOTION.

Now comes the plaintiff in the above stated cause and respectfully moves the court to make and enter the attached findings of fact, supplementary to the original findings of fact heretofore submitted by the plaintiff.

R. LEWIS BROWN,
Assistant United States Attorney, District of Montana.

KENNETH R. L. SIMMONS,
District Counsel, Department of the Interior, U. S. I. I. S. [261]

[Title of Court and Cause.]

SUPPLEMENTARY FINDINGS OF FACT.

XV.

No classification or designation of the lands involved in this case, as grazing, agricultural or irrigable was ever made by allotting Agent Carl Rankin.

In accordance with instructions issued by the Secretary of the Interior in pursuance to the provisions of the Act of June 25, 1910, (36 Stat. L. 859) and the Act of June 4, 1920, (41 Stat. 571) Special Allotting Agent Charles E. Roblin classified the lands of portions of the following allotments owned by the defendants as grazing, agricultural or irrigable;

ALLOTMENT.	DEFENDANT.
Does Anything	Billie Miller
Goes Ahead	Robert Miller
Rose Peters	Nickels Dethlefsen and
Elsie Peters	Mary Dethlefsen.
Alice Peters	
Arthur Peters	
George Peters	
Henry Keiser	
Juanita Keiser No. 2	Antler Land
Frank Stewart	Company.
Joseph Garrett Stewart	

No lands in the remaining allotments, which allotments were made by Agent Rankin, were classified

by Agent Roblin for the reason that they were "dead" allotments, the classification of which was not provided for by the aforesaid Acts.

[Endorsed]: Filed Sept. 16. 1936. [262]

Thereafter, on September 16, 1936, an order extending time for Bill of Exceptions was filed and entered herein, in the words and figures following, to-wit: [263]

[Title of Court and Cause.]

ORDER.

For good cause shown it is ordered and this does order, that the Plaintiff above named may have and is hereby granted 90 days from this date, within which to prepare, serve and lodge with the Clerk its bill of exceptions to the proceedings this day had, and the rulings made in connection with the adoption by the Court of its findings of fact and conclusions of law herein.

Dated this 16th day of September, 1936.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Sept. 16, 1936. [264]

Thereafter, on October 13, 1936, the court signed and filed herein its Findings of Fact and Conclusions of Law, in the words and figures following, to-wit: [265]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Based upon the admissions in the pleadings and of counsel made in open court upon the trial of said cause and upon the evidence submitted and the proof adduced therefrom, the Court makes the following

FINDINGS OF FACT.

1. Neither M. H. Tschirgi nor Bertha Tschirgi, defendants, are in possession of nor have any control over the lands described in plaintiff's bill of complaint, and neither of said defendants have diverted or used any of the waters of the Little Big Horn River.

2. The lands owned, or leased, by the defendants, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller, Robert J. Miller, F. L. Yates, Emma F. Yates, Nickels Dethlefsen and Mary Dethlefsen, are former allotments to members of the Crow Tribe of Indians and situated within the boundaries of the Crow Indian Reservation, in the State of Montana, as diminished. [266]

3. That each of the above named defendants is the owner of the fee title, or a lessee in possession under valid and subsisting lease from the owner of the fee title, of the lands described in the answer of such defendants.

4. All of said lands were acquired by the defendants, or their lessors, or by the predecessors in interest of the defendants or of their lessors, either by mesne conveyances from the original Indian allottees or by purchase at government sales of deceased Indian allottees' lands.

5. Under Section VI of the Crow Indian Treaty of May 7, 1868, patents in fee simple were issued by the Government to all of the lands in question, which patents contain the following language: "Together with all rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging." In none of said patents was there any reservation of water or water rights. The Indian patentees conveyed to said defendants, or their lessors, or their predecessors in interest, by warranty deeds conveying "the premises, together with all tenements, hereditaments and appurtenances." Deeds from purchasers at such government sales to said defendants, or their lessors, or their predecessors in interest, contained the same words with reference to what was conveyed. No water nor water rights were reserved in any of said deeds.

6. That in each instance, after the issuance and delivery of said patents in fee, either the defend-

ants themselves, or their predecessors in interest, or the predecessors in interest of defendants' lessors, proceeded with reasonable diligence and constructed irrigation ditches through which said defendants or said predecessors conveyed water from the Little Big Horn River or Lodge Grass Creek, being unnavigable streams flowing within the boundaries of said Crow Indian Reservation, to, over and upon parts or portions of the irrigable lands contained within the above mentioned former Indian allotments. That ever since then said predecessors, defendants [267] lessors and the above named defendants have conveyed water from the Little Big Horn River or Lodge Grass Creek through said irrigation ditches to and upon said lands and have continuously irrigated said lands with the water so conveyed; and with the aid of such irrigation and proper cultivation have raised grass, hay, grains and other crops thereon.

7. The Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896.

8. Plaintiff, through its agents and officials on the Crow Indian Reservation, aided the said Peters family in the construction of their said ditch by furnishing the necessary lumber for the head gate for said ditch and by framing said lumber for said head gate and thereby the Peters appropriation of

water of Lodge Grass Creek was known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs.

9. The said Peters appropriation of water was made before some of the irrigation projects of the government on said Reservation were begun and before the others were completed.

10. That in and about September, 1928, the defendants, F. L. Yates and Emma F. Yates, constructed an irrigation ditch, tapping Lodge Grass Creek as described in the joint and separate answer, to convey water upon their garden and small hayfield and for stock and domestic purposes, and used water through said ditch for said purposes; and that about the same time, the defendants constructed or placed and kept in a state of repair a ditch tapping Percheron Creek, a tributary of Lodge Grass Creek, as described in the joint and separate answer of these defendants, to convey water to irrigate some 50 acres of hayfield and used water through said ditch when any water was available for said purpose; all of which is more vividly shown on defendant's Exhibit 54, being [268] a blue print on a large scale of defendant's holdings.

11. One-half miners' inch of water per acre at the point of delivery on the irrigated land is sufficient for the proper irrigation of the lands belonging to the defendants and the Crow Indians which are irrigable from the Little Big Horn River and Lodge Grass Creek and their tributaries.

12. The instructions of the Secretary of the Interior to United States Special Allotting Agent, Charles E. Roblin, were to make allotments to only such Indians as were living on December 4, 1920. Only three of the Indians whose allotments comprised the lands of these defendants, Antler Land Company, were living on December 4, 1920. The said Charles E. Roblin made no classification of the lands of the deceased Indians as to being "irrigable," "non-irrigable agricultural" or "grazing" lands, but the said allotting agent did classify the lands of the living Indians, and such portions of the living Indians' lands, as had a similar status to the lands of the Antler Land Company, affected by this action, were classified as "irrigable."

No classification or designation of the lands involved in this case, as grazing, agricultural or irrigable was ever made by Allotting Agent Carl Rankin.

In accordance with instructions issued by the Secretary of the Interior in pursuance to the provisions of the Act of June 25, 1910, (36 Stat. L. 859) and the Act of June 4, 1920, (41 Stat. 571) Special Allotting Agent Charles E. Roblin classified the lands of portions of the following allotments owned by the defendants as grazing, agricultural or irrigable:

ALLOTMENT	DEFENDANT
Does Anything	Billie Miller
Goes Ahead	Robert Miller
Rose Peters	Nickels Dethlefsen and
Elsie Peters	Mary Dethlefsen. [269]
Alice Peters	
Arthur Peters	
George Peters	
Henry Keiser	Antler Land Company
Juanita Keiser No. 2	
Frank Stewart	
Joseph Garrett Stewart	

No lands in the remaining allotments, which allotments were made by Agent Rankin, were classified by Agent Roblin for the reason that they were "dead" allotments, the classification of which was not provided for by the aforesaid Acts.

13. The Secretary of the Interior duly approved the allotments made by Special Allotting Agent, Charles E. Roblin, wherein the said three tracts were classified as irrigable.

14. The Crow Indians gave the Secretary of the Interior permission to construct irrigation ditches with tribal money but they did not authorize him to use or withhold the use of water in respect to any particular piece of land or any particular Indian.

15. The Secretary of the Interior has made no rules or regulations for a division of the waters of the Crow Indian Reservation among the various

individual Indians or the various individually allotted tracts of land within said Reservation.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW.

1. Plaintiff has failed to establish a cause of action herein against M. H. Tschirgi and Bertha Tschirgi who were improperly joined as party defendants.

2. The Defendants, M. H. Tschirgi and Bertha Tschirgi, are entitled to a decree of this Court dismissing this cause of action as to them.

3. The Crow Indians, in their treaty with plaintiff in 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries at least to an [270] extent necessary to irrigate all lands irrigable from such streams, or any of them. The rights so reserved continued to exist against the United States and in favor of individual Indians and their grantees and successors in interest and the grantees in the aforesaid governmental sales and their successors in interest.

4. The purpose of the allotment act of February 18, 1887, was to provide for the distribution of water to individual Indians. A just and equal distribution must be made and the duty devolved upon the Secretary of the Interior to provide rules and regulations therefor. The waters upon the Reser-

vation were reserved for the individual Indians and not for the Crow Tribe of Indians.

5. Under the treaty of May 7, 1868, and under the patents issued by the Government, each member of the Crow Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of forty acres, and such vested right has a priority of May 7, 1868. Subject to that limitation of acreage, each irrigable acre is entitled to the same amount of water as any other acre on the Crow Indian Reservation. In case of shortage of water, it is entitled to its pro rata share of the available water whether his land is under a government ditch or not.

6. In Montana the conveyance of land with its appurtenances, where no definite intention to the contrary is expressed, conveys the water right used to irrigate such land.

7. The defendants, as owners and as lessors of the lands in question, have the same vested right to the use of the waters of said river, creek and their tributaries in the irrigation of their said lands as their and their lessors' Indian predecessors in interest had before the alienation of such land.

8. The purchaser of such lands, either from the Indian allottee or at such government sales, acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantors. [271]

9. The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters of said river, creek and their tributaries to the exclusion of other members is an usurpation of power and illegal.

10. Each defendant is entitled to a water right, to the extent of one-half miners' inch of water per acre delivered on said land, for the actual acreage that was under irrigation at the time title passed from the Indian allottee by his deed or from the plaintiff at such sales of deceased Indian allotments and such increased acreage as the defendant, or his lessor, or his or his lessors' predecessors in interest, may have placed under irrigation with reasonable diligence after securing title to such land.

11. Because of the aid furnished by plaintiff's agents and officials on the Crow Indian Reservation to the Peters family in furnishing and framing the necessary lumber and timbers for the head gate for the Peters ditch, the legal presumption follows that such aid was with the consent, knowledge and acquiescence of the Secretary of the Interior.

12. The court finds the issues herein in favor of the defendants, and each of them, in accordance with their respective claims as set forth in their answer and relief will be awarded accordingly.

13. As plaintiff failed to make out a cause of action against said defendants, or any one of them, plaintiff is entitled to no relief herein.

14. Costs herein are awarded as follows:

Each side to stand its costs. [272]

15. Let decree be entered in accordance with these findings and conclusions.

Decision incorporated.

Done in open court October 13th, 1936.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed October 13, 1936. [273]

Thereafter, on October 20th, 1936, the Decree of the Court was signed and filed herein, in the words and figures following, to-wit: [274]

In the District Court of the United States for the District of Montana, Billings Division.

No. 2962.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS R. POWERS, EDWARD SCHROEDER, M. H. TSCHIRGI, BERTHA TSCHIRGI, ANTLER LAND COMPANY a Montana corporation, B. B. BELKEN EDITH G. BELKEN, JUDY WALSH, H. G CAMPBELL, REG. PEARCE, JAY L. HENMAN, RUTH HENMAN, F. L. YATES EMMA F. YATES, GEORGE S. GIBSON JOSEPH A. GRAHAM, DOMINIC STEVENS, NICKELS DETHLEFSEN, MARY DETHLEFSEN, C. E. LINTHACUM BILLIE MILLER and ROBERT J. MILLER

Defendants.

JUDGMENT AND DECREE.

This cause came on to be heard April ____, 1935. Evidence was introduced on behalf of plaintiff and the answering defendants M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, F. L. Yates, Emma F. Yates, Nickels Dethlefsen, Mary Dethlefsen, Billie Miller and Robert J. Miller. The cause was then submitted to the court. Thereafter and on October 13, 1936, the court made and filed herein its findings of fact and conclusions of law to the effect that plaintiff had failed to make out a cause of action against said defendants or any one of them, and was entitled to no relief herein, and that each and all answering defendants herein had established their respective claims as set forth in their answers and were entitled to the relief prayed for.

WHEREFORE, By reason of the law and the premises aforesaid and based upon the evidence and the aforesaid findings of fact and conclusions of law, it is ORDERED, ADJUDGED and DECREED that plaintiff is entitled to no relief herein; that the Crow Indians in their treaty with plaintiff of May 7, 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries to the extent necessary to [275] irrigate all lands on the Crow Indian Reservation which are irrigable from said streams or any of them; that the rights so reserved have continued to exist against the United States and in favor of individual Indians and their grantees and successors in interest and the grantees who ac-

quired any of said lands at government sales of allotments to deceased Indians and the successors in interest of such grantees; that each member of the Crow tribe of Indians owning land on the Crow Indian Reservation irrigable from the waters of said streams, or any of them, secured a vested right to sufficient water therefrom to irrigate his said land to the extent of at least forty acres in each allotment; that such vested right has a priority as of date of May 7, 1868; that subject to limitation of acreage, each irrigable acre is entitled to the same amount of water as any other acre irrigable from said streams, or any of them; that in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its prorata share of the available water therefrom, whether such land is under a government ditch or not; that such right is vested in each and every grantee of any of such irrigable lands; that said answering defendants, as owners and lessors of such lands, have the same vested right to the use of the waters of said river, creek and their tributaries in the irrigation of their said lands as their or their lessors' Indian predecessors in interest had before the alienation of such land; that the purchaser of such lands, either from the Indian allottee or at such government sales, and his grantees, acquired the title and water rights held by the Indian allottee and is entitled to the same character of water right with equal priority as was held by his Indian grantor; that the attempt of plaintiff, when there has been a shortage of water in said river, creek or tributaries, to divert all of

the waters therefrom to certain members of the Crow tribe of Indians and to certain grantees of Crow Indians and to exclude other members of the Crow tribe of Indians and their [276] grantees from the use of any of said waters was an usurpation of power and illegal; that one-half miner's inch of water per acre delivered upon lands irrigable from said river, creek and their tributaries is required and is sufficient for the irrigation thereof, and that each of said answering defendants is entitled to that amount of water for the irrigation of his lands, whether owned or leased by him, which are irrigable from said river, creek or tributaries, and which were under irrigation when he, or his predecessor in interest, acquired title thereto, or were placed under irrigation with reasonable diligence after he, or his predecessor in interest, acquired title to such land, and that each party pay his own costs and disbursements herein.

Done in open court October 20th, 1936.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and Entered October 20, 1936. [277]

Thereafter, on November 30, 1936, the Statement of Evidence, lodged herein on October 13, 1936, was signed and approved by the court, and filed herein, in the words and figures following, to-wit: [278]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED STATEMENT OF THE EVIDENCE.

BE IT REMEMBERED that this cause came o regularly for trial on the 30th day of April, 193 before Honorable Charles N. Pray, a Judge of th above entitled Court, sitting without a jury. Honor able James H. Baldwin, United States Attorney fo the District of Montana; R. Lewis Brown, and Ro F. Allen, Assistant United States Attorneys fo Montana; and Kenneth R. L. Simmons, Distric Counsel Department of the Interior, U. S. India Irrigation Service, appeared as counsel for th plaintiff. Ben P. Harwood, Esquire, and Messr Burke & Collins appeared for the defendants M. H Tschirgi, Bertha Tschirgi, Antler Land Company B. B. Belken, Edith G. Belken, Judy Walsh, H. G Campbell, Jay L. Henman, Ruth Henman, Billi Miller and Robert J. Miller, Messrs. Tensil & Lam appeared for the defendants F. L. Yates and Emm E. Yates. Messrs. Johnston, Coleman & Jameso appeared for the defendants [279] Nickels Dethlef sen and Mary Dethlefsen. Whereupon the follow ing proceedings were had.

The COURT: The next case is the case o United States v. Thomas R. Powers, et al. Are yo ready, gentlemen?

Mr. SIMMONS: We are ready, Your Honor.

Mr. JOHNSTON: If the Court please, unde stipulation between the parties hereto under date o September 24, 1934, it was stipulated that plainti

might amend their bill of complaint by adding at the end of paragraph three the following: "That at the time of the adoption of the treaty of May 7th, 1868, and the creation of the Crow Indian Reservation, there was at that time reserved sufficient water of the Reservation for the needs of the Crow Tribe or Nation of Indians for irrigation, domestic and other purposes." Now I would like the record to show that that allegation deemed denied by my clients, Mr. and Mrs. Dethlefsen, and I presume you would like the same record, Mr. Burke.

Mr. BURKE: Yes, I would like the same denial for the defendants represented by us.

The COURT: Very well.

Mr. JOHNSTON: If the Court please, I ask leave at this time to amend the answer for the defendants Dethlefsens by inserting at the end of line 20 on page 12, in which paragraph I allege that there are other parties—other white farmers diverting water from the Little Big Horn River and Lodgegrass Creek and their [280] tributaries who should be made parties defendant, the same as the motion submitted while I was absent.

The COURT: Yes.

Mr. JOHNSTON: And I would like to add to that paragraph these words—I will give each of you gentlemen a copy—"that the waters so diverted by said persons from said river, creek and their tributaries, are taken therefrom at points above the places where plaintiff diverts waters from said river, creek and their tributaries, for the irrigation of

lands on said crow Indian Reservation." I as leave to make that amendment.

Mr. BROWN: We object to that amendment a being immaterial, Your Honor, to any issue raise in this case.

The COURT: Is there any objection to it othe than its materiality? What was your objection?

Mr. BROWN: That is the objection, that it i immaterial and raises no issue and has been alread passed upon by the Court.

Mr. JOHNSTON: I appreciate what he say Your Honor, but I find on my return in the brief filed by counsel for the Government that the onl obj ction that seemed to me to be of merit was tha I had not stated in my affidavit that this diversio of water was made above the points where th Government took out water from these streams an therefore it was immaterial whether those partie were made parties or not. Now I want to cove that objection, even though the Court rules agains me.

The COURT: Taken above their point of diver sion?

Mr. JOHNSTON: Yes; now the point I mak is this: that those parties divert the water abov the point where the [281] Government makes it diversion.

The COURT: You say that is immaterial?

Mr. BROWN: Yes.

The COURT: Well, let it stand, and we will se later whether it is material or not.

Mr. JOHNSTON: Do you mean that you permit the amendment?

The COURT: Yes.

Mr. JOHNSTON: Now, if the Court please, the defendants Dethlefsens had an engineer, Mr. Gustafson, make a survey of their ditch and also of their irrigated lands. We had the subpoena issued and sent to Hardin where he had formerly lived and to be served on him. We were advised, however, that he was in Butte, so we sent the subpoena to Butte for service and the sheriff of Silver Bow County returned the subpoena saying "Enclosed find subpoena for G. A. Gustafson unserved, for the reason that said Gustafson was operated on this morning and is confined to the hospital." I took this matter up yesterday with Mr. Brown and Mr. Simmons and we agreed orally—they agreed that they would admit that if Mr. Gustafson were present he would testify that this plat prepared by him (Exhibiting plat to the Court) showing the irrigation ditch of the two defendants Dethlefsen is a correct plat of the Lodgegrass Creek and of the ditch and the point of diversion and direction and that it is also a correct—shows correctly the acreage under irrigation on their various tracts of land, and that the capacity of the ditch, its size and grade is such that it carries 91.6 miner's inches of water; that is, the capacity of the ditch. Is that correct, Mr. Brown?

[282]

Mr. BROWN: We will admit that he would so testify if he were here.

Mr. JOHNSTON: And I presume, in order to complete the record, I should have the Reporter mark this plat that I referred to.

The COURT: Yes. It should be marked for the defendants Dethlefsen.

(Exhibit referred to marked "Defendants' Dethlefsens Exhibit One").

The COURT: Did you introduce that plat in evidence, Mr. Johnston?

Mr. JOHNSTON: Of course I might offer it in evidence now if the Court will permit that to be done out of order. Otherwise, I might forget it. Would that be all right, gentlemen?

Mr. BROWN: We prefer that it be offered in his case in chief. We will call your attention to that Mr. Johnston, if you don't.

Mr. JOHNSTON: All right then, thank you.

The COURT: Now is that all of the preliminary matters? You may proceed then, Mr. Brown.

Whereupon, the opening statement in behalf of plaintiff was made by Mr. Brown, followed by statement by Mr. Johnston in behalf of the defendants Nickels Dethlefsen and Mary Dethlefsen, and statement by Mr. Burke in behalf of the defendants M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller. [283]

C. E. LEWIS

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination testified as follows:

I am an irrigation engineer, and am employed by the United States Indian Irrigation Service, having been employed in that Service since 1897. I am now and have been since 1913, the Project Engineer on the Crow Irrigation Project located at Crow Agency, Montana. I am under the supervision of Mr. W. S. Hanna, Supervising Engineer.

PLAINTIFF'S EXHIBIT TWO
Admitted

(Plaintiff's Exhibit Two is a large blue print map 4′ x 10′, marked "Plaintiff's Exhibit Two", showing the location of both the Government and individual ditches involved in this suit. It also shows the streams involved and the direction of their flow through a portion of the Crow Indian Reservation in Montana. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Testimony of C. E. Lewis continued.)

All of the private ditches shown on the map were surveyed by me. The Government ditches were surveyed by other engineers in the Government Service, and their points of location were taken from official Government maps at Crow Agency.

W. S. HANNA,

as a witness called in behalf of the plaintiff, be
first duly sworn upon direct examination testi
as follows:

My name is W. S. Hanna. I am a civil e
neer. I have been employed by the United St
Indian Irrigation Service since 1908. I am at p
ent Supervising Engineer of District No. 3,
have direct supervision of all irrigation project
this district which are operated and constructed
the Government. [284] I have had direct cont
with the Crow Indian Reservation since 1913.
of the records in my Office in Billings, the Proj
Office at Crow Agency and in the Indian Office
Washington, designate the Irrigation Project
the Crow Indian Reservation as, the "Crow Ind
Irrigation Project". After examination of Pla
tiff's Exhibit Two, I will state that a portion
the Crow Irrigation Project is shown on the m
Portions of the Project not shown on the map
Big Horn River, Soap Creek and Pryor Cre
Units which made up this portion of the irrigat
system of the Crows shown on this map, Plainti
Exhibit Two, are as follows: Upper Little H
No. 2, the Bozeman Trail Ditch, (marked "Bo
man Trail"), Forty Mile Ditch, the Reno Di
and the Agency Ditch, all of which divert from
Little Big Horn River. On Lodgegrass Creek
Government constructed the Lodgegrass No. 1 di
and the Lodgegrass No. 2 ditch.

(Testimony of W. S. Hanna.)

Each and every exhibit offered by plaintiff was objected to by the defendants on the grounds that they were incompetent, irrelevant and immaterial. The Court allowed a general objection to each of said exhibits and overruled each and every objection and permitted an exception to the ruling of the Court on each of said rulings.

PLAINTIFF'S EXHIBIT THREE
Admitted

(Plaintiff's Exhibit Three is a letter from H. J. Armstrong, Indian Agent at Crow, dated November 22, 1884, transmitting estimates by Bundock and Robinson, engineers, to the Commissioner of Indian Affairs at Washington, D. C. Pertinent portions of this letter are quoted below:

"In compliance with your "F" S 9859 dated May 28th 84 and with your request dated August 2 84 I have the honor to submit herewith my estimate for a system of irrigating ditches; being the report of the engineers, Bundock and Robinson, employed by me under the aforesaid letter of authority "F" 9859 to locate the ditches and make the estimates. I fear the Hon. Commissioner will think my estimate amounting to $56,994.00 somewhat extravagant at first glance but it seemed to me that the proper thing to do—looking at the matter from a standpoint of the same as if it were my own private business as I aim to do

(Testimony of W. S. Hanna.)

for all affairs connected with the agency—was to locate and make estimates for a complete system of ditches for the valleys of both the Big and Little Big Horn rivers above Fort Custer. The ditches 3 and 4 will irrigate the whole of the Big Horn valley from Soap Creek to Fort Custer the largest body of farming land on the Crow Reservation—being nearly all the valley from the Big Horn mountains down to Ft. Custer.

Above Soap Creek for a distance of about 10 miles there is some fine farming land but the banks of the Big Horn are lower as we approach the canyon, and the small farms already located there as well as others which will be located there during the next two or three years can be irrigated without much difficulty by the Indians themselves (with one or two white men to show them how to take the water out) directly from the Big Horn River. [285]

"* * * The ditches 1 and 2 are supposed to include all the ditching necessary on the Little Big Horn River from the Grass Lodge Creek down to this agency—a distance of 28 miles. I do not mean to say that these two ditches will cover all the farming land in this valley inside the 28 miles, but they include all the ditching that is practicable; and with a few irrigating wheels (wheels which by their own motion lift the water from the bed of the stream and pour it out on top of its banks) which we can build

(Testimony of W. S. Hanna.)

ourselves at an expense of about $25.00 each, will irrigate the whole of the 28 miles.

Above the mouth of the Grass Lodge Creek (on the Little Horn river) there is a great deal of fine farming land; but there are no wide valleys and there appears to be considerable more moisture as we approach the mountain range; furthermore, but few Crows are locating so high up in the valley, so that the plan for irrigating that region need not be considered at present.

From the Agency down the Little Horn to the fort (Fort Custer) there is about 10 miles of fine valley but we do not want to have it irrigated at present as we do not want to locate any Indians any nearer to the Fort than the agency until all the good land elsewhere is taken up.

"It will be less expensive to make these ditches according to the plans and estimate herewith submitted and thereby have a permanent valuable improvement which must be made sooner or later, and which will always do the Crows great good; than to try to take out a number of smaller ditches now and after awhile make the same ditches according to my estimates or according to any other estimates which may be made. Furthermore it is almost impossible to take out the smaller ditches or to irrigate those lands in any other way than according to the estimate submitted. The banks

(Testimony of W. S. Hanna.)

of both of these streams are cut banks—p
pendicular—and are of soft earth, so that I m
say it is impossible to take out small ditc
where we need them, or anywhere in fact, o
we succeeded in getting one out in the spri
for instance the bank would be found to h
washed away so much after the high water
midsummer that the opening to the ditch wo
be gone and our work thrown away.

"I would therefore respectfully request a
urge—as far as it would be proper for me
urge any matter upon the attention of the H
Commissioner—that the Hon. Commissio
advertise for proposals and award the contr
for this work direct from Washington so t
the work may go on as early next spring as
season will permit. If only a part of the w
can be done next season for lack of funds
would recommend that ditch No. 2 be c
tracted for in preference to the others as it
nearest to the agency and we must have it
furnish the agency with hay or haul our h
10 to 25 miles and then have great difficulty
getting it. Any of these ditches may be tak
out, carried along until they come to so
ravine running back into the stream from wh
they have been taken, and then dropped, to
taken up again when funds are more abunda
but I recommend that the entire work be c
tracted for at once * * *

(Testimony of W. S. Hanna.)

"As to the necessity for making the irrigating ditches estimated for I will simply quote what I have written before viz: "Without them our farming operations must be a partial failure nearly every year and almost an entire failure one half the years." " [286]

(Attached to this letter is an estimate in the form of a letter to H. J. Armstrong, United States Indian Agent, Crow Agency, Montana, from the engineering firm of Bundock and Robinson, portions of which are quoted below:)

"We herewith present to you our estimate of cost of construction of Irrigating Ditches proposed to be on the Crow Indian Reservation; and located by us.

"The location of the first ditch was commenced on the bank of the Grass Lodge Creek; a tributary of the Little Big Horn River, at a point about 700 feet above where the road crosses said creek.

"We located this ditch 20,200 feet long, but in our estimate we have made returns for the construction of 33700 feet of ditch which length will cover some Three Thousand acres of land.

"The estimated dimensions of this ditch are 6 feet wide on the bottom with an average cut of 2 feet and the fall is $\frac{075}{1000}$ of a foot per lineal 100 feet of ditch.

"The second ditch was commenced on the bank of the Little Big Horn River at a point

(Testimony of W. S. Hanna.)

about 1500 feet above where the road makes its third crossing going south; this is the crossing known as Reno's Crossing. We located this ditch 40800 feet, which length will cover about Four Thousand five Hundred acres of land. The estimated dimensions of this ditch are 8 feet wide on the bottom from the commencement to station 264, or 26400 feet, at which point the size is decreased to six (6) feet wide on the bottom and maintained that width to the end; the whole length having an average cut of 2 feet, and a fall of $\frac{75}{1000}$ of a foot per lineal 100 feet in length of ditch * * *

"No. 1 or Ditch from Grass Lodge Creek

Earth 30,000 cu. yds. @ 20¢	$6058.00
Fluming 5,000 feet Board Measure @ $70.00	350.00
Side Water Gates 3 @ $25.00	75.00
Headgate and Dam	220.00
	$6,703.00

"No. 2 or Ditch from Little Horn River

Earth 40,000 cu. yds. @ 20¢	$8000.00
Fluming 10,000 ft. B. M. @ $70.00	700.00
Side Water Gates 4 @ $25.00	100.00
Head Gate and Protection	250.00
	$9,050.00

(Testimony of W. S. Hanna.)

* * * * * * *

"A true copy. Crow Agency Montana Nov. 22d 1884 R. J. Armstrong Agent." [287]

PLAINTIFF'S EXHIBIT FOUR
Admitted

(Plaintiff's Exhibit Four is authority granted by the Secretary of Interior to the Commissioner of Indian Affairs to advertise for bids for the construction of an irrigation ditch on the Crow Indian Reservation, dated December 6, 1884. Pertinent portions of this letter are quoted below:)

"Agreeably to your recommendation, authority is hereby granted for the publication, by the Agent of the Crow Agency, of an advertisement as per form presented with your report, in the "Pioneer Press" of St. Paul Minn., and the weekly "Tribune" of Bismark Dakota, also by posters, inviting proposals for constructing an irrigating ditch upon the Crow reservation as per plan submitted, indicated as "ditch No. 2", and to enter into contract therefor with the lowest responsible bidder or bidders, in a sum not exceeding $9050., subject to the approval of this Department. * * *"

Ditch No. 2 mentioned in Exhibit Three, the letter from Mr. Armstrong, is known as the Reno Ditch on the Government Project. It is designated as "Reno" on the map, Plaintiff's Exhibit Two. I can mark with a white pencil the approximate loca-

(Testimony of W. S. Hanna.)

tion of the headgate where the first point of diversion of the Big Horn River was taken out by the Reno Ditch. (Witness at the request of counsel marked "X" upon Plaintiff's Exhibit Two in Section 16, Township 4 South, Range 35.)

PLAINTIFF'S EXHIBIT FIVE
Admitted

(Plaintiff's Exhibit Five is a report of Henry J Armstrong, Indian Agent at Crow Agency, Montana, dated September 20, 1885 to the Commissioner of Indian Affairs at Washington, D. C. Pertinent portions of this letter are quoted below:)

"This brings our report down to the subject of farming, which may be considered the most important work we have had before us. With white people it would be second to the stock business, but with Indians it is of the first importance, for the sole reason that it teaches them to have a settled residence, which is the starting point in the work of civilizing them. In a few years [288] "the stock business will be the most important. Our farming operations extend over a distance of 50 miles along the valley of the Little Big Horn River, the same in the valley of the Big Horn, and a settlement on Pryor's Creek, 60 miles west from this agency. Indians are encouraged to select the locations they prefer for their homesteads. In some cases they request us to select

(Testimony of W. S. Hanna.)

locations for them, which is always done. When they have once selected a location any change of residence is discouraged by the agent, and they seldom make a change contrary to the wishes of the agent * * *

"The most important permanent improvements we have completed this year are the dormitory building, a substantial structure, 40 by 70, and an irrigating ditch 8 miles long and 8 feet wide at the bottom, of sufficient capacity to irrigate 4,500 acres of land. This is more land than the Crows will cultivate for several years; yet the ditch will irrigate but few farms that are now cultivated for the reasons that they have been encouraged to spread out and occupy the whole of these two valleys, while but a small part is under this ditch. We have to plan for the future of these people, and it is not desired that such a large number of families should locate on the land covered by this ditch; there would not be sufficient to afford each man, woman and child a homestead when the patent came to be issued. So that while there are enough families claiming land under this ditch to occupy the whole 4,500 acres, only twenty-five farms now actually in cultivation are watered by it. Next season the number can be very much increased. A very large part of this 4,500 acres will be held for hay land, being more valuable for that purpose than for cultivation, as

(Testimony of W. S. Hanna.)

the military at Fort Custer require a large quantity of hay each year, and the Indians will derive a considerable revenue from this source.

"We must have many more miles of irrigating ditches. They will have to be made sooner or later, and there is no reason for delaying the work at all, as the Crows have the money to build them with. We have surveyed and had estimates prepared for two more ditches—one 14 miles long, in the valley of the Big Horn, above Fort Custer, and one 8 miles long, in the valley of the Little Big Horn, 20 miles above this agency. Both these ditches should be commenced as early next spring as the ground can be moved, and a third should be made in the valley of the Big Horn, below Fort Custer, all with the Indian moneys. The two located now will cost about $50,000. Many Indians will be willing to work on the ditches for daily wages, and, of course, they ought to be encouraged to do so; but the greater part of it will have to be done under contract, for the simple reason, if no other, that the agent has ten times as much work on his hands now as he can do, and the Department will never allow him a force of white men sufficiently large to manage such a work. The Indians will do pretty well if they make the lateral ditches. Contractors should employ Indians as far as practicable."

[289]

(Testimony of W. S. Hanna.)

After the Reno Ditch was constructed in 1885 there occurred a change in the river channel just up stream from the diversion point of the old ditch that left the head of the old ditch on a dry river channel. We then went up stream about three-quarters of a mile and took out another diversion point and built a new section of ditch to connect up with the old ditch. (Witness at the request of counsel placed a figure "1" upon Plaintiff's Exhibit 2.)

After the new diversion point was located approximately half of the ditch was reconstructed before we reached the old channel of the Reno Ditch. The width of the bottom of the ditch was approximately 8 feet. The carrying capacity of the reconstructed ditch was 85 second feet, which has been maintained from the time it was constructed until the present time. The reconstruction work was completed in 1919. At that time I was the superintendent in charge.

PLAINTIFF'S EXHIBIT SIX

Admitted

(Plaintiff's Exhibit Six is a letter from W. A. Jones, Commissioner of Indian Affairs to Walter H. Graves, Superintendent of Crow Irrigation, dated April 19, 1898. Pertinent portions of this letter are quoted below:)

"Referring to your report dated April 16, 1898, upon the condition of the irrigation work

(Testimony of W. S. Hanna.)

on the Crow Reservation, I have to direct that upon the expiration of your leave of absence, you return to the Crow Reservation and proceed to place the work in the best possible condition for temporary suspension with the funds in hand, $20,000. The matter of details will be left entirely to your discretion, keeping in view the end to be secured, namely, placing the ditch in the best possible condition to withstand the deterioration that will necessarily follow the suspension of the work for a considerable period. You are also directed to submit a statement, with maps or sketches if practicable, showing the ditches which should be protected by fences, indicating the number of miles on each ditch, also indicating where both sides of the ditch should be fenced, and where the fencing of but one side is necessary. This information is desired in order that this office may be enabled to direct the superintendent of constructed ditches where to erect the fences, and also to estimate the cost of such fences." [290]

PLAINTIFF'S EXHIBIT SEVEN
Admitted

(Plaintiff's Exhibit Seven is a letter from the Secretary of the Department of Interior to the Commissioner of Indian Affairs, advising that money appropriated by the Act of April 1, 1891

stimony of W. S. Hanna.)

then available. Pertinent portions of this letter quoted below:)

"In reply to your letter of the 11th ultimo, concerning irrigation on the Crow Reservation in Montana, you are informed that upon the opinion of the Assistant Attorney General for this Department I find that the money appropriated by the Act of March 3, 1891, is now available.

"Your recommendation that a civil engineer be employed at a compensation of $225. per month, to make the preliminary survey or investigation for the construction of an irrigation system on the Crow Reservation, as provided in the Crow agreement of December 8, 1890, and that authority be granted for the expenditure of $3,300., or so much thereof as may be necessary, for his compensation and the other expenses attending such investigation, payable out of the appropriation of $946,000. for carrying out the provisions of said agreement' is hereby approved."

(Testimony of W. S. Hanna.)

PLAINTIFF'S EXHIBIT EIGHT

Admitted.

C. W. Z.

M. R. B.

"16268 Department of the Interior
Washington, May 5, 1891.

The Commissioner
of Indian Affairs.

Sir:

There is transmitted herewith a commission for the appointment of Walter H. Graves to be Superintendent of Irrigation on the Crow Reservation in Montana, as provided in the Act of Congress approved March 3, 1891, (Public—No. 144, p. 57).

"He is directed to proceed to the Reservation at the earliest practicable moment, to make a thorough examination of the ground, and report a plan for performing the work, subject to the approval of the Department.

"Please prepare the necessary instructions for his guidance. [291]

"Mr. Graves is hereby designated a Special Disbursing Agent, and required to bond in the penal sum of $15,000.

"It appears, from correspondence with the Director of the Geological Survey, that the Superintendent will require the services of two assistants.

(Testimony of W. S. Hanna.)

"He may submit the names of two competent persons for appointment by the Department, giving names in full and legal residence, together with statement of the official position they will occupy, the date their services will be required, so that they may be duly informed by the Department, and the amount of salary, which cannot be in excess of $100 and $75 per month respectively.

"Their actual and necessary traveling expenses will be paid from their homes to the post of duty.

"The Superintendent is hereby authorized to employ such laborers, in accordance with the requirements of the said Act, as the progress of the work may demand.

"The compensation of the Superintendent, his actual and necessary traveling expenses, and all other expense necessarily incident to the work which he will be in charge of, is to be paid from the appropriation for 'Fulfilling Treaties with Crows, Cession of Lands, $946,000.

Very respectfully,

JOHN W. NOBLE,

Secretary."

PLAINTIFF'S EXHIBIT NINE

Admitted.

(Plaintiff's Exhibit Nine is a report by Walter H. Graves, Superintendent of Irrigation on the Crow Irrigation Project, dated September 1, 1896

(Testimony of W. S. Hanna.)

to the Commissioner of Indian Affairs at Washington, D. C. Pertinent portions of this letter are quoted below:)

"In compliance with your request for a statement as to what has been accomplished in the construction of the irrigating ditches on the Crow Indian Reservation in Montana up to the present time, I have the honor to submit the following:

"The work of construction actually commenced on the [292] 16th day of August, 1892, upon Ditch No. 1, or, as it has been commonly designated, the 'Agency Ditch'. This ditch takes its supply of water from the Little Big Horn River, a short distance (about half-a-mile) above the Crow Agency, and covers the lands along the west side of that river, between the Agency and Fort Custer. The entire area tributary to the ditch is 6180 acres, but of this, something over 1100 acres lie within the boundary lines of the military reserve, leaving only about 5000 acres serviceable to the Crows.

"This ditch was sufficiently completed to permit the water being turned into it in May 1893, but, owing to the delay in procuring lumber and other material, the gates and other structures were not finished until the following season. However, the ditch has been in use since May 1893. At the head of the ditch is a dam, which raises the water sufficiently high to command the lands about the Agency. This is a substantial structure, and is as permanent as any

(Testimony of W. S. Hanna.)

such work, not constructed of solid masonry, could be.

"The head-gates are built of rock, with foundations laid on bedrock, and in point of strength and durability, are unexcelled.

"The main channel of the ditch, to the south line of the military reserve, is about 7½ miles in length, and there are about 21 miles of lateral ditch channel; also, 1¼ miles of drainage ditch.

"To construct these channels, 115,000 cubic yards of material, mostly earth and gravel, were excavated.

"In making the lateral, distributing gates, check weirs, and other structures, the following material was utilized:

Lumber	59,760 feet B. M.
Nails, washers, etc.	1,600 lbs.
Bolts	1,620 Mo.
Cast-iron culvert pipe	84,868 lbs.
Tar	2 bbls.
Rock wall and foundation, laid in cement	485 cub. yds.
Dry rubble rock wall	350 cub. yds.

The carrying capacity of the ditch is 209 second feet.

DITCH No. 2

"This ditch is taken from the Little Big Horn River at a point about 35 miles above the Agency. It was constructed during the Spring of 1893. Water was run through the ditch for

(Testimony of W. S. Hanna.)

the first time about the 1st of August, 1893, and it has been in constant use since that time.

Length of main channel	4.19 miles
" " lateral channel	4.65 "
Material excavated, earth, rock, gravel, etc.	30,200 cub. yds.
Area covered	1074 acres
Lumber used	23,833 feet, B. M.
Nails and washers	955 lbs.

[293]

Bolts	385 No.
Cast iron culvert pipe	12,430 lbs.
Rock wall, laid in cement	125 cub. yds.
Carrying capacity of ditch	80 second feet.

* * * * * * *

DITCH NO. 6.

"This ditch is taken from Grass Lodge Creek, about 3 miles above its confluence with the Little Big Horn. It is designed to conduct the water to the uplands contiguous to the valley of the Little Big Horn River, and to be ultimately extended to supply a much larger area than is at present covered by the ditch, as it may become necessary to reclaim more of this land.

"As the ditch is at present constructed and in operation, it supplies about 5000 acres. Construction was commenced in the Fall of 1893, but before much advance had been made, we were forced to suspend operations for the Win-

Testimony of W. S. Hanna.)

ter. The following year we were compelled to intervene the construction of the Pryor's Creek and Soap Creek Ditches, and it was not until the Summer of 1895 that it was completed. Water was run through the upper portion during the Summer of 1894 and 1895, and supplied irrigation to some of the farms.

Length of main channel	10.78 miles
" " Lateral channel	16.50 "
Total amount of earth, gravel, and rock excavated	242,646 cub. yds.
Lumber used	75,985 feet B. M.
Nails	2312 lbs.
Bolts	2134 No.
Cast iron culvert pipe	32,756 lbs.
Cement masonry	29 cub. yds.
Dry rubble wall	89 cub. yds.
Tar	1 bbl.
Piling	1200 lineal feet
Carrying capacity	223 second feet.

DITCH No. 7

"This is the largest ditch yet undertaken, and is intended to irrigate the lands along the east side of the Big Horn River.

"The head of the canal is located at the foot of the Big Horn Canon, and directly against the mountain. The ditch is to extend down the valley some 35 miles, and is expected to irrigate from 33,000 to 35,000 acres of land. The loca-

(Testimony of W. S. Hanna.)

tion, plan, and estimate of cost of this canal, has been fully set forth in a former report.

"We have been at work upon it now almost eleven months. One section, about 2 1/3 miles in length is almost completed, and another section of 2 miles has about 85% of the work done. These sections lie at the head of the ditch, and constitute, with the exception of about 1 mile more of heavy work, the most difficult and expensive portion of the ditch. As soon as the work we are now engaged upon [294] is finished, the further construction is comparatively light and inexpensive for such a large canal. During the time that we have been at work upon it, we have excavated 234,000 cubic yards, of which 16,000 yards have been solid rock, which required blasting to remove, and 139,000 yards were cemented gravel and drift, which had to be excavated by hand labor, with pick and shovel.

"This piece of work has been a most arduous and difficult undertaking, considering the character of the labor and equipment at our disposal. Under the circumstances and conditions surrounding it, and the nature of the agreement under which it is executed, I am prosecuting this work as rapidly as it is possible to do so, for I am exceedingly anxious to complete it.

"Since I have been in charge, in the construc

(Testimony of W. S. Hanna.)

tion of these ditches we have excavated and handled nearly 800,000 cubic yards of earth, gravel and rock. We have constructed more than 100 miles of ditch channel, and water is flowing through most, if not all, of this channel at the present time, covering, and supplying with irrigation from 20,000 to 25,000 acres of land.

"About 65% of the work has been done by the Indians, and from 10% to 15% of it by the whites intermarried with them. The remainder has been done by skilled white labor.

"We have framed, and placed in structures of various sorts, over 300,000 feet of lumber, and have laid 850 cubic yards of cement masonry, in foundations, retaining-walls, etc. All of these ditches have been made unusually strong and durable.

"I feel certain that every dollar expended has an equivalent in useful and enduring structures, which exist to declare for themselves.

"Since the commencement, we have drawn from the funds set apart for this work, $257,599. Of this amount, $203,712 has been expended for labor, and $25,657 for material and transportation of same. Forage and other expense have cost about $11,250. and we have on hand at the present time about $8000, which however, will be all expended before the close of the present expenses in connection with the work now in course of construction.

(Testimony of W. S. Hanna.)

"The work planned for the future, is the completion of the East Big Horn Ditch. Nothing beyond this is contemplated as far as I am informed."

The ditch taken from the Little Big Horn River at a point about 35 miles above the Agency, referred to as Ditch No. 2 in Plaintiff's Exhibit Nine, we now know as the Forty Mile Ditch. It is marked "Forty Mile" on Plaintiff's Exhibit Two. (Witness [295] at the request of counsel marked a figure "2" on Plaintiff's Exhibit Two in Section 11, Township 7 South, Range 35 East.) Forty Mile Ditch diverts out of the Little Big Horn River. There has been no change in the location of the ditch from 1893 to the present time. It is not considered a 89 second foot ditch now. We maintain a capacity of about 30 second feet in the ditch.

Ditch No. 6 designated in Plaintiff's Exhibit Nine as a ditch from Grass Lodge Creek, is designated on Plaintiff's Exhibit Two as Lodgegrass Ditch No. 1. (Witness at the request of counsel marked a figure "3" on Plaintiff's Exhibit Two in Section 29, Township 6 South, Range 35 East.) Lodgegrass Creek is a tributary to the Little Big Horn River. It empties into the Little Big Horn River at the town of Lodgegrass, Montana. There has been no change that amounts to anything in the location of Ditch No. 6 as mentioned in Plaintiff's Exhibit Nine, from the time of this report to the present.

(Testimony of W. S. Hanna.)

Agency Ditch is the lower ditch in the Government system that is on the Little Big Horn River. It heads very near the town of Crow Agency, and is in Section 1, Township 3 South, Range 34 East. Work of construction on the Agency Ditch was commenced in 1892. There has been no change in the location of that portion of the Agency Ditch described in Plaintiff's Exhibit Nine, but the original construction went down only to the boundary of the Fort Custer Military Reservation, and since, or after that reservation was abolished, the ditch was continued until the main canal is now approximately thirteen miles long. The new construction was commenced prior to 1913. The carrying capacity of the ditch is a 210 second foot canal.

As Supervising Engineer I submit reports to the Commissioner of Indian Affairs of monthly progress and of costs, as well as annual reports. I have annual reports made since about [296] 1915. The original work on Lodgegrass No. 2 was done in 1904 according to the records. The length of the channel is a little less than five miles. Water is diverted from Lodgegrass Creek for this ditch approximately four miles above the head of Lodgegrass No. 1. (Witness at the request of counsel marked a figure "5" on Plaintiff's Exhibit Two in Section 11, Township 7 South, Range 34 East.) The carrying capacity of this ditch taken from the official project history of the Crow Indian Project, is 37 second feet. This is a Government record prepared by me and under my supervision. Referring to this record,

(Testimony of W. S. Hanna.)

the ditch has a six foot bottom. In 1913 the earth work was completed on Lodgegrass No. 2, but the structures had not been put in the lower half of it. We built the structures in the main canal on the lower half of it after 1913. The ditch was finally completed after 1913.

Excavation work on the upper Little Horn No. 2 Ditch was started in August, 1910 according to the records of the Project. This ditch diverts waters of the Little Big Horn River. (Wtiness at the request of counsel marked a figure "6" on Plaintiff's Exhibit Two in Section 15, Township 9 South, Range 34 East, the location of the point of diversion of Little Big Horn Ditch No. 2.) The main canal of this ditch is 8.7 miles, and it has 5.7 miles of laterals. The ditch has a 12 foot bottom at the head. Its carrying capacity is 115 second feet. The ditch has exactly the same location as when it was originally constructed. Only a few structures have been added to it and completed since my time.

Lodgegrass Creek and the Little Big Horn River come out of a deep canyon and flow into a more open country where the valleys spread out. The valleys which are narrow begin just about at the boundary line between Montana and Wyoming. As a general rule on each of these streams the valleys widen out as you go down the stream. The widest valleys are just north of Crow Agency. [297] There is one wide valley under the Reno Ditch. The carrying capacity of Lodge Grass No. 1 is 200 second feet. I have an official Government record showing the ultimate

(Testimony of W. S. Hanna.)

irrigable acreage which has been reported year after year in our annual reports taken from various surveys that have been made on the Project. The ultimate irrigable acreage under the Agency Ditch is 6,149.19 acres. That is the ultimate irrigable acreage under that unit at the present time. Our records show the ultimate irrigable acreage of lands that lie under the Reno Ditch is 3,619.13 acres, under the Forty Mile Ditch 1,060.42 acres, under the Lodge Grass No. 1, 4868.38 acres, under Lodge Grass No. 2, 1828.52 acres. That is the acreage we carry as irrigable acreage. The ultimate irrigable acreage that lies under Upper Little Horn No. 2 Ditch is 3,248.36 acres. The total ultimate irrigable acreage under the Bozeman Trail Ditch is 2,819.39 acres. The total ultimate irrigable acreage which can be irrigated from that portion of the Government irrigation project that takes the waters of the Little Big Horn River is 23,393.39 acres.

PLAINTIFF'S EXHIBIT TEN.

Admitted

"Irrigation

W A W

19620-28 June -8 1928

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

There is attached hereto a Public Notice to be issued in connection with fixing the reimbursable costs of the Crow Irrigation Project.

(Testimony of W. S. Hanna.)

This notice is promulgated by reason of direction contained in section 8 of the Act of Congress approved May 26, 1926 (44 Stat.—658-661). A report from the supervising engineer's office for district 3 under which the Crow Irrigation Project is situated, shows the expenditures to have been made from the following funds and appropriations: [298]

Name of Fund	Non-Reimbursable Tribal	Non-Reimbursable Gratuity	Re- bur
Miscellaneous Funds		133,280.65	
Crow Ceded Lands	393,640.86		
Fulfilling Treaty with Crows	31,315.64		
Crow Funds	78,815.15		
Proceeds of Crow Ceded Lands	228,861.44		
Indian Warehouses		5,410.34	
Agency Warehouses		358.03	
Reclamation Fund			
Increased Compensation	3,130.97		
Chief Engineer's Office Charge to June 30, 1926			14,3
Interest, Crow 4% Funds	27,787.40		
Irrigation, Ind. Res. (Reimb.)			135,65
Crow Labor Proceeds	146,763.40		
Indian Moneys, Proceeds of Labor, Crow Indians	379,313.12		
Crow Consolidated 4% Fund	275,126.92		
Indian Moneys, Proceeds of Labor, (Increased Compensation)	480.41		
Imp., Mtce. & Opera. Irr. Sys. Crow Res. Mont. Reimb. 1924-25			$123,57
	1,565,235.31	139,049.02	$273,59
Total expenditure			$1,977,87

(Testimony of W. S. Hanna.)

"The amounts shown as expenditures from these various funds and appropriations are taken from the project books and are believed to be correct.

"The following is a list of the various ditches or units under the Crow Irrigation Project, with the acreage considered irrigable at the present time:

Big Horn Unit	28,706.23	Acres
Agency Unit	6,113.96	"
Lodge Grass No. 1 Unit	4,876.43	"
Pryor Unit	4,465.32	"
Forty Mile Unit	1,059.33	"
Soap Creek Unit	1,816.81	"
Two Leggins Unit	5,642.00	"
Upper Little Horn No. 2 Unit	3,361.24	"
Lodge Grass No. 3 Unit	1,606.00	"
Reno Unit	3,619.92	"
Bozeman Trail Unit	1,961.34	"
Total Ultimate Irrigable Area	63,328.58	Acres

"This acreage, however, is subject to change, as pointed out in Mr. Hanna's letter accompanying the report, at such time as an irrigable survey shall be made. It is therefore deemed advisable to promulgate the order without fixing a definite per acre cost at this time. The per acre assessment, however, can be fixed at $.25 per acre with the understanding as shown in the proposed order that any adjustments

(Testimony of W. S. Hanna.)

required owing to [299] a decrease or an increase of the ultimate irrigable area under the project may be cared for in the final payments.

"It is, therefore, recommended that the Public Notice be promulgated according to the draft inclosed.

Respectfully,
CHAS. H. BURKE
Commissioner.

Approved: Jun 18 1928
(Sgd.) JOHN H. EDWARDS
Assistant Secretary."

"Irrigation
W A W
19620-28

Public Notice
fixing construction charges for
Crow Irrigation Project
Montana

Jun - 8 1928

(Section 8 of the Act of Congress dated May 27, 1926 (44 Stat. 658-661) is herein set out in this exhibit.)

"The total expenditures of moneys from all sources for the construction of the irrigation system on the Crow Reservation to June 30, 1926, amounted to $1,977,879.10. Of this amount, $1,565,235.31 were expended from tribal funds, $139,049.02 from gratuity appropriations, and $273,594.77 from reimbursable appropriations. Of these moneys the amount of $273,594.77, expended from reimbursable ap-

(Testimony of W. S. Hanna.)

propriations in accordance with section 8 of the act above quoted, is to be reimbursed by the owners of irrigable land under the Crow Irrigation Project.

"The records show that the estimated irrigable area within the project is 63,228 acres. The total amount of reimbursable expenditures, or $273,594.77 prorated over this acreage gives a per acre reimbursable charge of $4.33.

"Owing to the fact that the acreage shown is not based on a careful survey, it is deemed impracticable to definitely fix the total per acre charge until a complete resurvey is made. Pending such definite survey the annual per acre assessment is hereby fixed at 25¢ per acre, the first assessment to be due and payable November 15, 1928, and a similar sum to be due and payable [300] on the same date annually thereafter until the entire amount of reimbursable expenditures shall have been assessed against the land. Any adjustments that may be required owing to a change in the acreage under the project as shown by the resurvey of the project, will be taken care of prior to the final assessments.

"No further construction work will be done on this project unless authorized by Congress. In that event the owners of lands to be benefited thereunder will be required to execute an agreement to repay their proper share of the total cost of the project assessable against such lands benefited.

(Testimony of W. S. Hanna.)

"This public notice fixing the per acre assessment does not affect any existing agreements obligating purchasers of Indian allotments to pay the constructing cost as estimated at the date of the approval of the sale, as such sum was part of the consideration to be paid for the land. All payments made by purchasers in excess of the per acre amount fixed by this public notice shall be placed to the credit of the Indian allottee or his heirs as the case may be, as the price the purchaser agreed to pay for the land was fixed on the basis of the value of the land itself added to the estimated construction cost as of that date.

"No water for irrigation purposes shall be delivered to any land for which assessments are unpaid one year or more after the due date, except trust patented land irrigated by Indian allottees and only then upon written authorization of the Superintendent of the reservation to the Supervising Engineer. A copy of each such authorities should be forwarded to the commissioner of Indian Affairs and they shall contain a full statement of the reasons why such payments cannot be made.

CHAS. H. BURKE
Commissioner.

5 EDD 31
Approved:
JOHN H. EDWARDS
Assistant Secretary."

(Testimony of W. S. Hanna.)

Plaintiff's Exhibit Ten shows the total ultimate irrigable acreage of all lands under the Government irrigation project as 63,228.58 acres. No portion of that acreage lying under that part of the irrigation project which derives its water supply from the Little Big Horn River has ever been [301] irrigated from any other source of water supply. By ultimate irrigable acreage I mean the area that the canal system was designed and built to serve. The reason we have not irrigated the irrigable acreage is principally that the Indians have not commenced to farm that portion yet. They are only farming a part of it. The acreage actually irrigated by the Government Project in 1934 on each unit, taken from official records in my Office, follows:

Agency Unit	2347	Acres
Reno Unit	1696	"
Forty Mile Unit	311	"
Upper Little Horn No. 2	1783	"
Bozeman Trail	990	"

This acreage does not represent only the Indian land, but takes in all the irrigated land. These lands are checker-boarded over the whole area. In most cases it is only a portion of the farms that receive water. Last year, in 1934, we used in the Government irrigation project system all of the waters that we had to irrigate these 8,000 acres.

I am acquainted with a ditch on the Little Horn River known as the Tschirgi Ditch. It is not one of the ditches of the Government unit built by the

(Testimony of W. S. Hanna.)

Government, but is a private ditch. The point of diversion of the Tschirgi Ditch is above all points of diversion of Government ditches on the Little Big Horn River. It was built after 1913. I never gave any consent in my official capacity to the construction of that ditch nor to the taking of water out of the Little Big Horn River.

I am acquainted with the Campbell-Belken Ditch which is marked on Plaintiff's Exhibit Two as "Campbell-Belken Ditch". (Witness at the request of counsel marked upon Plaintiff's Exhibit Two a figure "8" in Section 32, Township 8 South, Range 35 East.) This ditch was built after I came on the Reservation. It is a private ditch. I never gave any consent to [302] the building of that ditch as Superintendent. I had no authority to give such consent, nor did I have authority nor did I give consent to the taking of the water from the Little Big Horn River for use in said ditch.

I am familiar with the Dethlefsen Ditch, marked on Plaintiff's Exhibit Two as such. (Witness at the request of counsel marked upon Plaintiff's Exhibit Two a figure "9" in Section 24, Township 8 South, Range 33 East.) This ditch is a private ditch. I am also familiar with the diversions of William Miller and Robert Miller. I have been on both of them. They are also private ditches. They form no part of the Government irrigation project. They divert from Lodge Grass Creek. One is marked "William Miller" on the map. The ditch line is thereon designated as "William Miller Ditch".

(Testimony of W. S. Hanna.)

(Witness at the request of counsel marked upon Plaintiff's Exhibit Two with white pencil the figure "10" in Section 32, Township 7 South, Range 34 East.) The other ditch is designated by the name "Robert Miller". (Witness at the request of counsel marked upon Plaintiff's Exhibit Two with white pencil the figure "1" in Section 29, Northeast corner thereof, Township 7 South, Range 34 East.)

I am also familiar with the ditches taken out by the defendant, Yates. Those ditches I believe are marked "Yates" on the map. There are two or three ditches there. Those ditches are named "Moore Ditch" in our correspondence. (Witness at the request of counsel marked on Plaintiff's Exhibit Two with white pencil, as follows: Figure "12" in northeast corner of Section 18, Township 9 South, Range 33 East; figure "13" in center of Section 20, Township 9 South, Range 33 East; and figure "14" in center of Section 20, Township 9 South, Range 33 East.)

The points of diversion of all the defendants, the Dethlefsens' ditches, both Millers' ditches and the Yates' [303] ditches, are above the points of diversion of the Government ditches known as Lodgegrass Ditch No. 1 and Lodgegrass Ditch No. 2.

I am acquainted with the ditch of Jay L. and Ruth Henman. (Witness at the request of counsel marked on Plaintiff's Exhibit Two with white pencil, the figure "15" in Section 10, Township 5 South, Range 35 East.) This ditch is marked on the map with the words, "Henman". This is also a

(Testimony of W. S. Hanna.)

private ditch. It was built after I came on the Reservation. I gave no authority to build that ditch nor to take any waters from the stream. The point of diversion of the Henman Ditch is above Government diversions of the Agency and Reno Ditches and below some of the other Government ditches. I, as Superintendent, never gave any permission to construct any of these ditches or for them to use the waters of the river.

Cross-Examination
of W. S. Hanna

By Mr. BURKE:

The Crow Irrigation Project is considered in our records as being one project, the Crow Indian Irrigation Project, which includes twelve or fourteen units. I don't know that I can put my finger on any acts of Congress which give authority to classify this project as one unit, but that is the way our authority has come from the Secretary for the expenditure of money in most cases, blanket authorities for the Crow Irrigation Project, especially for the operation and maintenance.

Mr. BURKE: I ask the Court to take judicial notice of the Act of June 4, 1920, Forty-one Statutes 751, known as the Crow Act.

Under the Act of June 4, 1920 I prepared itemized statements showing the total cost of the several irrigation projects. All of the [304] projects that have been considered by the Government as Government projects in the Little Horn country, which

(Testimony of W. S. Hanna.)

I have enumerated in my direct examination, are all the projects that have ever been approved as part of the project, part of the Crow Irrigation Project. The Government records refer to the ditch designated on Plaintiff's Exhibit Two as the "Tschirgi Ditch" as proposed Ditch Number One. This ditch was surveyed by Government engineers as a proposed project, the same as they surveyed a large number of other ditches that were never built. They surveyed them for study propositions and selected the one that they wanted to put into the project. There were a large number of ditches run that were never constructed.

I have in my records and file a record of Upper Little Horn No. 1, which we call the Tschirgi Ditch. There was a map made of that ditch. This map is in my office, the same as a number of these other ditches. We have a large number of those surveys. There was a water filing made on Upper Little Horn No. 1, which listed certain areas and certain sections. I am familiar with the order of the Secretary of the Interior dated February 7, 1933 regarding the lands under Upper Little Horn No. 2 and Upper Little Horn No. 1. This letter is an order and a part of the official records of the Interior Department. (Instrument referred marked "Defendants' Exhibit Eleven" for identification.)

(Testimony of W. S. Hanna.)

DEFENDANTS' EXHIBIT ELEVEN
(Proposed and refused.)

"United States
Department of the Interior
Office of the Secretary
Washington

Feb 17 1933 [305]

"Mr. T. H. Burke,
Attorney at Law,
Billings, Montana.

My dear Mr. Burke:

In the matter of water rights for lands of E. C. Woodley, E. K. Woodley, Helen Woodley, M. H. and Bertha Tschirgi, and Johnson R. Boyd, Crow Reservation, Montana.

"On February 6 and 7, 1933, you appeared before me as attorney representing the landowners above-named, and presented the claim of these landowners to the ownership of a paid-up water right on all of the lands hereafter described. It is the contention of the landowners that the lands were purchased upon the understanding that they were irrigated lands carrying with them water rights appurtenant to the land and that the purchase price included payment for the Indians' land and the appurtenant water right. The list of land includes all tracts which were either fee patented to the allottee or were sold at a Government sale prior to the beginning of actual excavation work on the canal system that serves the area.

(Testimony of W. S. Hanna.)

"The lands affected were all allotted Indian lands on the Crow Reservation and the names of the allottees with description of the allotments are as follows:

Allotment Number	Allottee	Land Description	Total Area
1381	Red Plume (J. F. Mills)	NE¼NW¼ Sec. 7 T. 9S. R. 35E) NW¼NE¼ Sec. 7 T. 9S. R. 35E) SW¼NE¼ Sec. 7 T. 9S. R. 35E)	120
1383	Catches the Enemy	SW¼SE¼ Sec. 7 T. 9S. R. 35E) NW¼SE¼ Sec. 7 T. 9S. R. 35E) NE¼SW¼ Sec. 7 T. 9S. R. 35E) SE¼NW¼ Sec. 7 T. 9S. R. 35E)	160
1696	David Yarlott	NE¼NW¼ Sec. 15 T. 9S. R. 34E) SE¼NW¼ Sec. 15 T. 9S. R. 34E) E½NW¼ Sec. 15 T. 9S. R. 34E)	160
1695	Frank Yarlott	NE¼NE¼ Sec. 15 T. 9S. R. 34E) NW¼NE¼ Sec. 15 T. 9S. R. 34E) SW¼NE¼ Sec. 15 T. 9S. R. 34E) SE¼NE¼ Sec. 15 T. 9S. R. 34E)	160
1697	Finds things Wellknown	SE¼SE¼ Sec. 11 T. 9S. R. 34E) NE¼SE¼ Sec. 11 T. 9S. R. 34E) Lot 1 Sec. 14 T. 9S. R. 34E) SE¼NW¼ Sec. 14 T. 9S. R. 34E)	159.17
1698	Goes for Wood	SE¼NE¼ Sec.11 T. 9S. R. 34E) NW¼SE¼ Sec. 14 T. 9S. R. 34E) Lot 2 Sec. 14 T. 9S. R. 34E) SW¼NE¼ Sec. 14 T. 9S. R. 34E)	159.17

[306]

1129	Charles Yarlott	SW¼SW¼ Sec. 11 T. 9S. R. 34E) NW¼SW¼ Sec. 11 T. 9S. R. 34E) W½NW¼ Sec. 23 T. 9S. R. 34E)	
1311	Wellknown	SW¼NE¼ Sec. 6 T. 9S. R. 35E) SW¼NE¼ Sec. 36 T. 8S. R. 34E) E½NE¼ Sec. 36 T. 8S. R. 34E)	160.18

(Testimony of W. S. Hanna.)

1314	Knows the Otter	SW¼NE¼	Sec. 6 T. 9S. R. 35E)	
		W½NW¼	Sec. 36 T. 8S. R. 34E)	160
		NW¼SW¼	Sec. 36 T. 8S. R. 34E)	
1313	Stands on a Cloud	SE¼NW¼	Sec. 6 T. 9S. R. 35E)	
		NW¼NE¼	Sec. 36 T. 8S. R. 34E)	160
		E½NW¼	Sec. 36 T. 8S. R. 34E)	
822	Russell White Bear	SW¼NE¼	Sec. 32 T. 8S. R. 35E)	
		S½NW¼	Sec. 32 T. 8S. R. 35E)	160
		SE¼NE¼	Sec. 31 T. 8S. R. 35E)	

"The lands described are all or partially irrigated from ditches constructed by the United States in what is known as the Little Horn Unit of the Crow Reservation project, Montana. The property passed from Indian ownership or was fee patented in 1909 and 1910. The question arises whether the lands were acquired with a paid-up water right and therefore not subject to construction charges for repayment of the cost of the irrigation system to the extent of $40 per irrigable acre, payable over a term of 20 years.

"The record evidence is not entirely conclusive in support of the claim of the white landowners but the statutes and the general scheme for irrigation of the lands make it apparent to me that when the sales were made it was the intention of the parties that such water right as the Indian allottee owned or possessed would be conveyed with the land for the consideration named in the deed of conveyance.

"The first act of Congress providing for irri-

(Testimony of W. S. Hanna.)

gating lands on the Crow Reservation, Montana, is found in the act of March 3, 1891 (26 Stat. 1640), which provided for the survey, establishment, and construction of ditches and canals and authorized the expenditure of tribal funds for the purpose. This act set aside $200,000 for building dams, canals, ditches, and laterals for the purpose of irrigation in the valleys of the Big Horn and Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper. The act of March 1, 1899 (30 Stat. 947), and the act of May 31, 1900 (31 Stat. 247), contain identical language as follows:

> Provided that with the consent of the Crow Indians in Montana, to be obtained in the usual way, the Secretary of the Interior, in his discretion, may use the annuity money due, or to become due, the said Indians to complete the irrigation system heretofore commenced on said Crow Indian Reservation.

"The statutes with the consent obtained from the Indians constitute the authority for using annuity money. From the [307] time of the first appropriation up to 1918, the tribal funds of the Crow Tribe, were used under the authority to expend annuity money until there had been expended from these funds more than $1,000,000, and no provision had been made for

(Testimony of W. S. Hanna.)

reimbursement of the expenditure by the landowners whose lands were benefited. When the appropriations were made, it appears to have been the plan to use the tribal and annuity funds for the development and improvement by irrigation of lands on the Reservation and, since there were no lands owned by whites, all benefits accruing from the irrigation would inure to the Indians and their tribal or their allotted land.

"In connection with the Little Horn Unit of the irrigation system, preliminary surveys of the ditches were made between October 28, 1907, and November 2, 1907. A map dated March, 1908, was made by the Indian Office and is now in the files of that office, which showed the location of Upper Little Horn Ditch No. 2 and Upper Little Horn Ditch No. 1, and there is indicated on the map the number of acres irrigable in each legal subdivision lying under the ditches named.

"In pursuance of the scheme for irrigating the land, the United States, in accordance with the laws of Montana, posted through the Indian agent, notice of appropriation of water from the Little Big Horn River, which notice was dated February 24, 1908, and is filed in Book A, page 784, of the records of Big Horn County, Montana. Further detail surveys of irrigable area and ditch locations were made in 1908 and 1909 and the actual excavation of ditches began

(Testimony of W. S. Hanna.)

September 10, 1910. The work progressed rapidly and water was delivered to some of the land the ensuing year.

"The construction cost of the Crow Indian Reservation Irrigation system on June 30, 1921, was $1,640,000, of which $1,497,000 came from Crow tribal and annuity funds and $143,000 were gratuity appropriations from the United States Treasury. June 30, 1926, the expenditure of money from all sources for the construction of irrigation systems on the Crow Reservation amounted to $1,977,879.10. Of this amount $1,565,235.31 was expended from tribal funds, $139,049.02 from gratuity appropriations, and $273,594.77 from reimbursable appropriations from the Federal Treasury.

"By the act of June 4, 1920 (41 Stat. 751), Congress attempted to make reimbursable the expenditures that had been made for irrigation works. There was an attempt to create liens against all of the irrigated lands for the repayment of the construction charges but these provisions could not be effective against lands that had been conveyed from the Indians to private ownership several years before the enactment of the lien laws. The legislation did not create a lien for the expenditures made from tribal funds against the lands described above if such lands were acquired with a paid-up water right and were conveyed to bona fide purchasers before the lien law was enacted. The purchasers

(Testimony of W. S. Hanna.)

of the property acquired the rights held by the allottees and these allottees at the time of the sale believed they were conveying to the purchasers the land with the appurtenant water right.

"In order to settle the dispute, it is my conclusion that if [308] "contracts are made by the landowners for repayment of approximately $4.33 per irrigable acre on the terms and conditions stated in the public notice of June 8, 1928, the lands described above can be considered as entitled to a paid-up water right upon completion of the payments required by such contracts.

Very truly yours,

JOS. M. DIXON (Signed)

First Assistant Secretary."

This exhibit was offered in evidence and was objected to on the ground that it was incompetent, irrelevant and immaterial, hearsay, an ex parte statement out of Court not under oath, and not subject to cross-examination; also made by one who had no authority in this matter. It was further objected to because the letter was signed by Joseph M. Dixon as Assistant to the Secretary of the Interior and relates to what he says exists in another office, the Indian Office, and that the letter relates to lands under irrigation Ditch No. 2 and the ditch involved is not the ditch about which the inquiry was made. The Court sustained the objection and denied the admission of the defendants' Exhibit Eleven in evidence.

(Testimony of W. S. Hanna.)

There were other lands which could be brought under irrigation on the Little Horn River. The Campbell Ditch, designated on Plaintiff's Exhibit Two as such, is shown on the Government records as proposed Upper Little Horn No. 3, as another proposed ditch that was never built by the Government. This ditch was surveyed by the Indian Irrigation Service. I am not certain whether or not we have a map of that ditch, but I believe there is such a map. I think our No. 2 shows the No. 3 ditch on the same map. Defendants' Exhibit Twelve is a correct copy of [309] map of proposed Upper Little Horn Ditch No. 2 and No. 3, which is on file in my office and made under the direction of my office. This exhibit is a blue print of that tracing that I mentioned a while ago, of the No. 2 and No. 3 Ditches on the same map.

DEFENDANTS' EXHIBIT TWELVE
Admitted.

(Defendants' Exhibit Twelve, the blue print of the tracing described herein, marked "Defendants' Exhibit Twelve," has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

Plaintiff entered the following objection to the introduction of Defendants' Exhibit Twelve: That it contains much immaterial matter, and so far as the matter which is material in it contained, it is shown by the Exhibit Two in evidence, by the Government map. Our position is simply this; it is a

(Testimony of W. S. Hanna.)

tracing or drawing of something that never came into existence, is not material, and as far as the matters that are material and involved in this case are concerned, they are all covered by the map now in evidence, and the added matter, if any, on this map, relates to a proposed Ditch Number Three which may have been surveyed but was never used by the Government as a part of the irrigation project and it was never determined finally that it ever would be constructed. We are not dealing with what might be, Your Honor, but we are dealing with the conditions and the facts at the time the complaint was filed in this case, with ditches actually in existence. We take the further position, if Your Honor please, that if the Government did survey and plan to build this ditch it certainly did not authorize some individual to adopt its survey and do the things that it might have intended to do. And that is their condition here, that the Government failed, and "we did build it, and if we did build it under that condition we have a right"

The Court allowed the exhibit to go in under objection [310] and likewise allowed all testimony in connection with this exhibit to go in under the same objection and granted plaintiff an exception to this ruling.

From the record, from the water filing made, the upper portion of the No. 1 filing is included under the Tschirgi Ditch, but the original filing covered a great deal more land. There are some 6,000 acres under the original filing. Approximately all of the

(Testimony of W. S. Hanna.)

Tschirgi land was under the Upper Little Horn No. 1 filing. As I remember the filing made for the No. 3, the Campbell-Belken Ditch, the proposed Upper Little Horn Ditch, this covered 1300 acres. The Campbell Ditch would be the upper end of the original filing of Government proposed ditch known as "Upper Little Horn No. 3". The carrying capacity of the Government projects which I have given are the capacities our records now show. Those ditches carry approximately the capacity I gave in my direct testimony.

There is some loss in seepage from all the Government ditches that are in earth. I am familiar with the Preston and Engle report which is among the Government records. There is no unnecessary loss in Lodgegrass No. 2 by reason of its construction. It doesn't exactly take it over a divide. Lodgegrass No. 1 carries water along the hillside of the Lodgegrass valley until it laps over the Little Horn valley. There is no unnecessary loss of water by the manner of construction of these Government projects. We could not have reached land in the project without building the ditches where they are.

I think that the ultimate irrigable area is approximately the same as the arable acreage in the Preston-Engle report. Those 6,149.19 acres mentioned in my direct examination are according to our records the acreage that is susceptible of irrigation and are farm land under that system. From the topography of the country this acreage can be irrigated. We know that there are some small tracts of said land,

(Testimony of W. S. Hanna.)

and perhaps [311] some small tracts that are too rough to prepare for farm lands, but the percentage would be small. There would be very little reduction when that determination is made.

The Preston-Engle report says "acres arable and acres irrigable". Now in our records we show ultimate irrigable acres in the same places it shows acres arable and area under constructed works. The Preston-Engle report for the Agency unit, shows 6113.9 acres arable. The present figures on ultimate irrigable area which correspond to that figure in the Preston-Engle report is 6149.19. There is a difference of 36 acres. The Preston-Engle report gives acres arable as 3619.9. Our corresponding figure is 3619.13. The Preston-Engle report gives the acres irrigable as 3019.2. This figure is accounted for by construction to bring that land under cultivation.

Under the Bozeman Trail Ditch approximately 1961 acres were Indian owned at the time the ditch contract was let, and 858 acres, I think, of white owned land. The Bozeman Trail Ditch is not a Government project. We own an interest in the Bozeman Trail. We paid for the construction cost applicable to 1961 acres of Indian land. There is a contract between the United States and the Bozeman Trail Ditch Company that provides for the payment of this part of the cost and other provisions for the division of the water. This ditch was constructed by a private ditch company and the United States purchased an interest in it.

Mr. BURKE: We offer in evidence Defendants'

(Testimony of W. S. Hanna.)

Exhibit Number Thirteen.

Mr. BALDWIN: We object to it as incompetent, irrelevant and immaterial and not proper cross-examination. We object on the further ground that it is not within the issues. We say there was a drouth and there was a shortage of water in the stream. You must stand upon your case wherein you allege that there is a shortage of water and you are injured. [312] You deny that there was a shortage of water and having denied its existence, you can't prove that there was a shortage.

The COURT: Well, I will let it go in and be referred to under objection.

DEFENDANTS' EXHIBIT THIRTEEN admitted.

"BOZEMAN TRAIL DITCH CONTRACT.

"THIS AGREEMENT made and entered into this 24th day of July, 1922, by and between the United States of America, acting in this behalf by W. S. Hanna, Supervising Engineer, thereunto duly authorized, party of the first part, hereinafter referred to as the Government, and the Bozeman Trail Ditch Company, a corporation organized and existing under the laws of the State of Montana, with its principal office at Wyola, Big Horn County, Montana, party of the second part, hereinafter referred to as the Company.

"WITNESSETH, Whereas an Act approved March 3, 1921, making appropriations for the

(Testimony of W. S. Hanna.)

current and contingent expenses of the Bureau of Indian Affairs and for other purposes for the fiscal year ending June 30, 1922, contains an item authorizing payment of the proportionate part of the cost of constructing the Bozeman Trail Ditch on the Crow Reservation, Montana, properly assessable against lands allotted to the Indians irrigable thereunder, and

"WHEREAS the Company has constructed an irrigation ditch beginning at a point of diversion which bears south twelve degrees and forty-two minutes east, fifteen hundred and fifty-two feet from the north quarter corner of Section eleven, township nine south, range thirty-four east; thence in a northeasterly direction through Sections eleven and one, township nine south, range thirty-four east, section 6, township nine south, range thirty-five east and sections thirty-one, thirty, twenty-nine, twenty, seventeen, twenty-one, sixteen and fifteen, township eight south, range thirty-five east to a point thirteen hundred and twenty feet east of the west quarter corner of Section fifteen, township eight south, range thirty-five east, a total distance of 9.79 miles, more particularly shown by the map of definite location hereto attached and marked "Exhibit A" and made a part hereof; said canal at cross-sections having a bottom width of five feet and a top width of fourteen feet and a water depth of one and one-half feet, with a carrying capacity of 65.25 second-feet of

(Testimony of W. S. Hanna.)

tion purposes to all irrigable land, being 2819.39 acres, lying under it at the rate of one second-foot for each eighty acres of land, and

"WHEREAS the Government hereby grants the Company the right to go upon Crow Indian allotments within the limits [313] of the right of way granted said Company on May 27, 1922, for the purpose of rebuilding, altering, repairing and maintaining said canal; also the right to divert water therefor from the Little Big Horn River, and

"WHEREAS, for the rights and privileges herein granted by the Government to the Company, the Company for itself, its successors, transferees and assigns, hereby sells, transfers, assigns and conveys absolute water rights in said canal for the proper irrigation of 1961.34 acres of allotted Indian lands thereunder, such rights being evidenced by water certificates issued in pursuance to provisions contained in its articles of incorporation. The Company shall be further paid for such water rights upon making proper showing the balance due by the Government of its share of the cost of the construction of the project over and above the amount of $17,450.52, which sum, on April 15, 1922, was due the Company as evidenced by an itemized statement submitted to and approved by the Government and will be paid immediately after this agreement shall have been properly approved, and

(Testimony of W. S. Hanna.)

"WHEREAS, as a further consideration for the rights herein granted, the Company further stipulates and agrees that the annual maintenance charge assessable against the trust patent lands within the project shall be limited to the actual expense of operating, repairing and maintaining said canal, and that such assessment shall be borne ratably by all water users, and that the Commissioner of Indian Affairs, on the appeal of any Indian water owner, shall have the right to determine whether such charge is or has been made in accordance with actual and necessary reasonable cost, and

"WHEREAS the Company further agrees that no extension of the project shall be undertaken nor any additional water rights sold unless and until such contemplated action shall have been submitted to the Government and received its approval, and

"WHEREAS it is mutually agreed and understood by the parties hereto that the rights of any Indian owner in said canal shall be the same as that of any other owner of like amount of rights therein, and that such rights shall be represented and voted, in accordance with the shares of stock held by the Government, by such person as the Commissioner of Indian Affairs shall designate;

"IN WITNESS WHEREOF the Government has caused this agreement to be executed by its duly authorized representative and the

(Testimony of W. S. Hanna.)

Company has caused it to be executed by its President and attested by its Secretary who has caused its corporate seal to be affixed the day and year first above written.

THE UNITED STATES OF AMERICA

[Seal] By (Sgd.) W. S. HANNA
Supervising Engineer.

BOZEMAN TRAIL DITCH COMPANY

By (Sgd.) CARL W. CROSS
President.

Attest:

(Sgd.) FRED E. MILLER
Secretary.

Approved: Aug. 4, 1922.

(Sgd.) M. R. BROOK,
Assistant to the Secretary of the Interior.

JDR. [314]

"RESOLUTION

"WHEREAS the Bozeman Trail Ditch Company, a corporation, has constructed an irrigation ditch on the Crow Indian Reservation, and the United States Government, through the Bureau of Indian Affairs, has authorized payment of the proportionate part of the cost of constructing said ditch on the Crow Reservation, Montana, properly assessable against lands allotted to Indians and irrigable thereunder, and

(Testimony of W. S. Hanna.)

"WHEREAS it is necessary that a contract be entered into by the parties,

"NOW THEREFORE, be it resolved by the Board of Directors of the Bozeman Trail Ditch Company, a corporation, that the president and Secretary thereof be, and they are hereby authorized and directed to enter into a contract with W. S. Hanna, Engineer in charge, acting for the United States, a copy of which contract is hereunto attached.

(Sgd.) CARL W. CROSS
President.

Attest:
(Sgd.) FRED E. MILLER
Secretary.

"I, Fred E. Miller, Secretary of the Bozeman Trail Ditch Company, a corporation, do hereby certify that the foregoing resolution was duly passed at a regular meeting of the Board of Directors of said company, held at Wyola, Montana, on the 24th day of July 1922.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said company.

[Seal] (Sgd.) FRED E. MILLER."

I testified under direct examination that there was not sufficient water in the stream in 1934 to supply Government projects.

Then the following question was asked by Mr. Burke of counsel for the defendants: "In 1934 was

(Testimony of W. S. Hanna.)

there water taken out of the Little Horn River and used by the Bozeman Trail, that was used on lands that were not under Government projects?" An objection was taken on the ground that it was incompetent, irrelevant and immaterial, and on the further ground that it was not proper cross-examination. The Court over-ruled the objection and an [315] exception thereto was taken.

In 1934 there was water used in the Bozeman Trail Ditch that was rotated in that ditch the same as it was in the other ditches. We considered the Bozeman Trail Ditch a part of the Government system for the Indian owned lands under the Bozeman Trail Ditch. The water for the white owners was paid for by them. The water for the white owned land under the Bozeman Trail Ditch was taken out of the supply in the river through the Bozeman Trail Ditch. The Little Big Horn River rises in Wyoming. One of the tributaries to the Little Big Horn River is Pass Creek. There is water, taken out of Pass Creek and used in irrigating white owned land, which (otherwise) would go down to the Government projects. There is some land irrigated from Pass Creek in Wyoming and some inside of the Reservation. The only defendants who divert below the place where Pass Creek empties into the Little Big Horn River are the Henmans.

Eight thousand acres is the most land that our records show have been irrigated in one year; but during the various years since that project has been

(Testimony of W. S. Hanna.)

built, practically all of the 23,000 acres have been irrigated at one time or another. The Indians will farm a tract of land for a period of time and abandon it and move over to another and farm another place, so that I would say that practically all of that area has been irrigated at one time or another.

By MR. JOHNSTON:

The ditch of the Dethlefsens is located above all the ditches on Lodgegrass Creek and the Agency and Reno Ditches on the Little Horn. The other ditches out of the Little Horn are below the junction of Lodgegrass Creek and the Little Horn. The water taken out by the Dethlefsens would affect the water in those ditches from the Little Big Horn above the junction of the two, for the reason that the water that is coming down could be used to supply the Agency and Reno Ditches, where otherwise [316] we would have to let it go past our other ditches. It does not affect the Government ditches in the upper area on the Little Horn River.

All of the 23,000 acres that I speak of as being irrigable under these Government projects was land that was allotted as irrigable. As far as I know we have thrown out the lands which we considered non-irrigable. There may, however, be a few acres that may come out on final land classifications, as I stated previously. The capacity of the Bozeman Trail Ditch, according to the records, is 70 second feet. I believe the white settlers had 856 acres under the Bozeman Trail Ditch at the time the contract was made. They may have purchased a little more.

WILLIAM A. LAMB,

was a witness called in behalf of the plaintiff, and having been first duly sworn upon direct examination testified as follows:

My name is William A. Lamb. I live at Helena, Montana. I am a civil engineer by profession, and am now employed by the United States Geological Survey. I have been employed by the Geological Survey for 31 years.

From time to time the Geological Survey obtains data from actual measurements to ascertain the flow of the rivers of the State. This work is carried on under the Water Resources Branch, for which I work. This work is carried on under my supervision in Montana. Between the years 1912 and 1924 such work was carried on to obtain a record of the flow of the Little Big Horn River. After measurements were taken in the field they were sent to my district office at Helena, Montana. The flow of the stream was computed there from the information obtained in the field and prepared for publication. This data was prepared under my [317] direction in my office at Helena, Montana. After the data was completed it was forwarded to Washington, re-checked there and finally prepared for publication and published in a series of publications known as Water Supply Papers, which are official Government records of all the work done by the Water Resources Branch of the Service.

I have recently examined the figures from these Government publications and I have the mean

(Testimony of William A. Lamb.)

monthly flow of the Little Big Horn River for each year between 1912 and 1924 during May, June, July and August. These measurements were taken at our gauging stations located about 6 to 8 miles upstream from Wyola. That is in the north half of the southwest quarter of section twenty-eight, township eight south, range thirty-five east. This point is on the Crow Indian Reservation. The normal mean flow of the Little Big Horn River at that point near Wyola for the month of May each year is 325 second feet. For the month of June 557 second feet. For the month of July 226 second feet. For the month of August 111 second feet. No compilations have yet been made for the month of September.

Such a measuring station was also maintained by the Government under my direct supervision on Lodgegrass Creek on the Crow Indian Reservation. There was a station maintained in section 29, township 6 north, range 35 West from 1912 to 1915 inclusive, and from 1921 to 1924. There was a period of 8 years there between different periods, but the different periods are separated by quite an intervening period. These records were published in the same manner as the records kept on the Little Big Horn River. I have gone over these figures that have been published by the Government and computed them with the end in view of ascertaining the mean flow of Lodgegrass Creek for the months of May, June, July and August of each year. The mean flow [318] of Lodgegrass Creek each year

(Testimony of William A. Lamb.)

during the months of May is 119 cubic feet per second of water. For June, 234 cubic feet per second. For July, 71 cubic feet per second. For August, 32 cubic feet per second. The Government station maintained by the United States Geological Survey on Lodgegrass Creek was discontinued in 1924.

Cross-Examination of WILLIAM A. LAMB

By Mr. HARWOOD:

I have recorded in evidence only the data obtained in the station near Wyola. I have given nothing about the Crow Agency measurements. These were not compiled by me. The monthly averages taken from these reports is a compilation that I have made and checked. This compilation goes over some 12 or 13 years. It is subject to all of the variances of increase or decrease in irrigation from the streams that are taken out above the station in question. The figures show the actual number of cubic feet per second that passed our station each month. No doubt there was irrigation going on above the station in question during each of these years, and it undoubtedly varied from year to year, depending upon the amount of acreage. I would not say that these facts will have to be taken into account in examining the flow for any purpose of the mean monthly flow for the month of May through 12 years, but for the purpose of determining the total amount of water that would pass off from the drainage area, of course, you would have to do that.

(Testimony of William A. Lamb.)

One purpose of the data might be to show the amount of water that was going by that point unused. Of course, for that purpose the portions above would not affect the problem. Weather conditions would probably have some effect upon the amount of water that came down the stream from year to year. The flow [319] of a stream is affected by several different factors. One of the principal ones is the amount of precipitation that falls each year and its distribution throughout the year, so for that reason there is a great fluctuation of the stream from year to year, that would resolve itself down to the simple reason why we obtained these records over a series of years because no one year can be depended upon as a guide to know what the next year will be. You have to have a long series to arrive at any reliable conclusion.

There were no records published in the Geological Report from 1906 to 1912. There was no station maintained at Lodgegrass by the Geological Survey before 1919. We do not publish in our reports the total diversions, but we note them and it is not in our particular scope to determine them. We do not have any measurements as to the flow of Pass Creek. I do not know if any water had been diverted from Lodge Grass Stream above the Government stream gauging station in Lodge Grass Creek. There might be some little storm water entering the tributaries of Lodge Grass Creek below the Government stream gauging station, but they

were of no consequence. We have no record of the water flowing in Reno Creek.

PLAINTIFF'S EXHIBIT FOURTEEN
admitted

(Plaintiff's Exhibit Fourteen is a letter dated May 12, 1891 from the Acting Commissioner of Indian Affairs, approved by the Secretary of the Interior, to Walter H. Graves, Superintendent of Irrigation. Pertinent portions of this letter are quoted below:)

"The Secretary of the Interior having appointed you to be Superintendent of Irrigation on the Crow Indian Reservation in Montana, as provided in the Act of March 3rd, 1891, (Public No. 144, p. 57), the following instructions are given for your guidance in the discharge of your duties:

"This agreement with the Crow Indians, which was ratified by the above cited Act, provides for the expenditure, under the direction of the Secretary of the Interior, of $200,000 in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and Little Big Horn Rivers, and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper. Provided, That not to exceed $50,000 shall be expended annually in performing this work. [320]

"As soon as you receive official notice of the approval of your bond as Special Disburs-

(Testimony of William A. Lamb.)

ing Agent, you will proceed to the reservation and make a thorough examination of the ground, and report a plan for performing the work, which plan will be subject to the approval of the Department.

"This plan should be devised so as to provide for the irrigation of the largest quantity of lands selected by the Indians for allotment or likely to be selected by them at the least expense. The general plan should include such separate systems as may be necessary to properly irrigate the different portions of the reservation, but the aim 'to serve the greatest amount of irrigation of Indian lands with the least expense', should be strictly followed.

"The entire sum to be devoted to the work, including the pay and expenses of the Superintendent, and all other expenses incident to the plan and construction, is $200,000, not more than $50,000 of which can be expended in any one year. Should the expenditure be less than $50,000 in any one year, the balance can, in the opinion of this Office, be expended after the expiration of four years, but not before. This fact should be taken into consideration in estimating the cost of the proposed plan.

"Your report submitting the plan of irrigation should be sufficiently in detail to fully inform the Department as to the proposed location of the several dams, canals, and other works, and should be accompanied with maps and drawings.

(Testimony of William A. Lamb.)

"The estimated capacity of the several canals, and the quantity of land that will be covered by each, should be shown.

"A detailed estimate of the cost of the works for each portion of the reservation should be furnished.

"Further specific instructions are deemed unnecessary as your experience in such matters will doubtless enable you, after a thorough examination of the ground, to report a plan which will enable the Department to act intelligently in the premises.

"It is the desire of this Office that the money appropriated for irrigation on the Crow reservation shall be expended economically, judiciously, and for the best interests of the Indians, and for the accomplishment of this purpose it is expected that you will devote your time and energies.

"Special instructions have been given for your guidance in the preparation and rendition of your accounts, in order that they may conform strictly to the regulations of the Department governing such matters.

"You will keep this Office duly advised as to the progress of your work." [321]

PLAINTIFF'S EXHIBIT FIFTEEN
Admitted

(Plaintiff's Exhibit Fifteen is a report by M. P. Wyman, United States Indian Agent, Crow Agency,

(Testimony of William A. Lamb.)

Montana, dated October 22, 1891 to the Commissioner of Indian Affairs. Pertinent portions of this letter are quoted below:)

"I am greatly pleased to state that our crops have given excellent returns this year. There have been abundant yields of grain and vegetables of every description, and the Indians are feeling decidedly encouraged,—as the past three years have been little less than total failures. My Statistical Report forwarded herewith, exhibits the following returns in way of crops:

Wheat	2,000	bushels	By Indians
Oats	12,800	"	"
Corn	780	"	"
Potatoes	12,000	"	"
Turnips	3,000	"	"
Onions	90	"	"
Beans	20	"	"
Other Vegetables	920	"	"

Together with thousands of melons and pumpkins, etc.

"The Indians have also cut and sold two thousand (2000) tons of hay. The price being ten dollars ($10) per ton delivered. Most of this hay, about fifteen hundred (1500) tons, was put in on the contracts for hay for Fort Custer, the rest sold to the stock men, the agency, etc. This affords the largest income from hay ever

(Testimony of William A. Lamb.)

received by the Crows. The total income received by the Crows as result of this labor this season including government purchases will amount to slightly more than Thirty Thousand ($30,000.00) Dollars, quite a large sum will have been derived from a large field planted by the Indians to oats, potatoes and wheat . . . This field embraces several hundred acres and is all under the only irrigating ditch on the reservation, being in the Little Horn Valley about nine miles south of the agency. The results of cultivation of this field have been such that I contemplate enlarging the field to quite an extent another year. Such action will however necessitate additional employes during planting and harvest, also at the threshing. Without such increase probably three or four competent men this work cannot be conducted on the extensive scale contemplated. The Indians will however be glad to pay for such employes from their own funds. In my opinion the Crows can, with the assistance mentioned supply Fort Custer with all the grain required at that large post, I shall certainly make the attempt unless otherwise instructed.

"The vallies on this section of the Reservation are so admirably adapted to agricultural pursuits the ground being so rich and deep and the water supply abundant for the irrigation of every available acre that I am disposed (even in

(Testimony of William A. Lamb.)

view of the Hon. Commissioners letters of September 12th and 24 and Oct 7th suggesting the advisability of a change from an agricultural to a pastoral life) to encourage these Indians in the direction of agriculture to a considerable extent, provided one proposed system of [322] irrigation be undertaken and pushed forward with ordinary energy. * * *

"Walter H. Graves superintendent of irrigation for this reservation and his two assistants Messrs. Riley and Butler arrived at the agency last June and since then have been very busy surveying and drawing estimates for the extensive system of ditches required for the irrigation of this reservation. Mr. Graves evidently is master of his profession, and I have in consequence, high hopes that ere many seasons shall have passed the most fertile and extensive vallies in this section will be under irrigation. I deem it of importance that ere another season presents, at least a small ditch be constructed. A ditch from this agency to the Fort Custer Military reservation could be easily built, and it would open up an area of fertile land capable of supporting a large number of Indians. If the Indians can see some direct results in way of irrigation they will be greatly encouraged, and I trust that before another season presents we shall at least have a ditch from this agency to the military reservation. The expense will

(Testimony of William A. Lamb.)

be light. I am of the opinion that considering the large area embraced in the vallies of the Little Horn and Big Horn Rivers, a more fertile country cannot be found—after water is brought upon the land—or a country where the yield is greater. There is scarcely a limit to the yield of the land along these vallies. * * *"

C. E. LEWIS

was re-called as a witness in behalf of the plaintiff, and having been previously sworn upon direct examination testified as follows:

I am the same C. E. Lewis who testified yesterday. As Project Engineer of the Crow Irrigation Project, I have direct supervision of the ditch riders who ride that portion of the irrigation project receiving waters from the Little Big Horn and Lodge-rass Creek and their tributaries. They work under directions given by me.

The normal irrigation season on the Crow Indian Reservation is from May 1 to September 30. These dates are fixed by regulations promulgated by the Secretary of the Interior. In the last irrigation season of 1934 the quantity of water flowing down the stream decreased as the season progressed. I noticed the first decrease in the water about the latter part of May. Ordinarily there is a spring run off on the Crow Indian Reservation. This usually occurs in March. The high water period

(Testimony of C. E. Lewis.)

on the Crow is generally the latter part of May and the early part [323] of June. The highwater is caused ordinarily by the melting of snow in the mountains. Last year there was no run off in May and June. The condition of the snow fall on the Crow Indian Reservation and in the mountains in the winter and spring of 1933 and 1934 compared to its normal precipitation was unusually light. I do not remember any early spring snow in the year 1934 or any late spring rains in that year.

When I first noticed the water getting short in May I went up the irrigation project as far as the Tschirgi Ditch. I observed that the water was about equally divided between the river and the Tschirgi Ditch and the Little Big Horn Ditch No. 2. As I went up the stream I observed the Campbell-Belken Ditch and the Tschirgi Ditch. At that time there was about 9 cubic feet per second flowing in the Campbell-Belken Ditch, and about 24 second feet running in the Tschirgi Ditch. As the season went on the water supply deceased to such an extent in the Reno and Agency Ditches that there was an inadequate supply of water in these two ditches. During the irrigation season of 1934, it developed that there was no water at all available for use in the Reno or Agency Ditches. This occurred about the middle of July. I then went up the irrigation project toward the head waters of the stream to determine what was being done with this water. I, at that time, passed the diversion point of the Hen-

(Testimony of C. E. Lewis.)

man Ditch and found no water running in this ditch. I passed the point of diversion of the Campbell-Belken and Tschirgi Ditches, and found large heads of water running therein.

At that time in July I went up Lodgegrass Creek. The supply in Lodgegrass Ditch No. 1 was entirely inadequate. I do not remember of any water running through that ditch at that time. There was very little water running in Lodgegrass [324] No. 2. There was about 3 second feet of water running in Lodgegrass Creek just about the point of diversion of Lodgegrass No. 2. There was not enough water to go very far along Lodgegrass No. 2.

I went up to the Miller Ditches. There were small heads of water running in these ditches at that time. I also saw a small head of water running in the Linthacum Ditch and a small head of water going through the Dethlefsen Ditch. There were also small heads of water in the Stevens and Yates Ditches.

As Project Engineer, after I observed the channels of the Agency and Reno Ditches being dry I made arrangements to rotate the water between the upper and lower diversions. We got some water that way.

The length of the complete irrigation channel from the point where the Government Upper Little Horn Ditch No. 2 takes its water supply from the Little Horn, to the end of the channel of the agency Ditch is approximately 100 miles. In rotating the

(Testimony of C. E. Lewis.)

water the headgates of the Upper Little Horn No. 2, the Bozeman Trail Ditch and the Forty Mile Ditch were closed so as to permit the water in the stream to flow by.

The first rotation occurred on July 3. After closing the headgate of the Upper Little Horn No. 2 it took about five days for the water to get down to Agency Ditch. On the next rotation it took from seven to eight days. On the next rotation it took from ten to twelve days. When the water is short, in my administration of this irrigation project it is an administrative policy to rotate the water among the users. By rotation I mean that in a certain period we close the upper ditches and turn the water into the lower ditches, and in a later period we close the lower ditches and turn it out into the upper ditches.

When I first found that the water was getting short, in order to determine the amount of water flowing in the [325] Big Horn River, I made some measurements of the flow in the stream at various times in the Little Big Horn River above all the points of diversion, the Tschirgi diversion and all other points of diversion. Referring to my record I made my first measurement on June 18 on the bridge over the Little Big Horn on the road leading to Lodgegrass Creek, at a point about a mile from the southern boundary of Montana, which is above all points of diversion on the Little Big Horn River. By actual measurement I found there was

(Testimony of C. E. Lewis.)

a flow in the Little Big Horn River at that time of 142 second feet. My next measurement was made on June 29 at the same place. I then found 123 second feet flowing. My next measurement was on July 19 and I found 92 second feet flowing in the Little Big Horn River. My next measurement was on August 8 and I found 83 second feet.

I also went up towards the head waters of Lodgegrass Creek and made measurements to determine the amount of water flowing in Lodgegrass Creek. I made these measurements on a bridge on the north boundary of the Moore land. This measurement was made above all diversions with the exception of the two Moore diversions. The Moore Ditches divert about 3 second feet. That is their maximum capacity. These measurements on Lodgegrass Creek were made above the diversions of the Millers, the Dethlefsens and the Yates. On June 29 I found 17 second feet of water flowing in Lodgegrass Creek. On July 23—13 second feet. I made no further measurements. At the time I made the measurements we attached a gauge to the bridge and the flow remained constant throughout the season—15 second feet.

We have records at the Crow Indian Agency that show all of the land owned by the Indians, and the amounts susceptible of being irrigated from the Government irrigation ditches. These records are voluminous. They are here in Court and I have made a computation of the amount of lands owned

(Testimony of C. E. Lewis.)

by the Indians [326] which lie under that portion of the irrigation project involved in this case.

Q. (By Mr. Brown) And will you give us the total figures in acreage, if you please?

Mr. JOHNSTON: We object to that as incompetent and irrelevant for the reason that it refers to lands susceptible of irrigation and not lands under irrigation in 1934.

(To the Court): You will recall that the testimony yesterday established that there were 23,000 acres susceptible of irrigation and only 8000 acres is the most that has ever been irrigated.

The COURT: Very well, on cross-examination they can develop whatever they went to from that.

Mr. JOHNSTON: We except to the ruling.

Of the total area there are 23,593.39 acres. The Indian owned land is 17,032.14 acres.

Q. (By Mr. Brown) Now Mr. Lewis, during the month of June and July and August of 1934, was there sufficient waters running in the Little Big Horn River, Lodgegrass Creek and their tributaries to irrigate that amount of land owned by the Indians and in need of water for irrigation?

Mr. JOHNSTON: We object to that on the ground that that is irrelevant.

The COURT: Yes, he qualified that by saying "land in need of irrigation".

Mr. JOHNSTON: Well the question really is not irrigable land you know; and no showing has been made as to how many acres of that land was under irrigation at that time or under cultivation. [327]

(Testimony of C. E. Lewis.)

The COURT: Well of course this man is an expert; he ought to know what land of the Indians that susceptible of irrigation needed irrigation. Now that is the substance of this question. I will allow him to answer. Overrule the objection.

Mr. JOHNSTON: Exception.

Mr. HARWOOD: Your Honor, I would like to make a further objection to this question. It was framed on the basis of a statement by the witness that there were 17,000 acres out of the total of 23,000 acres under the Government project now under discussion which were within the ultimate irrigable area of that total section of land. The question does not specify, by laying a proper foundation before band, that those Indian lands that are now in question were desiring water for irrigation, that the land was made ready for water for those lands. They may have been lying there vacant. That 17,000 acres is the total that could be irrigated, as they testified before from this particular system, but they have also shown in their own direct testimony that only a thousand acres have ever been irrigated in any one year. To permit this witness to answer a question as to whether or not the supply was sufficient to irrigate the total irrigable area last year—then——

The COURT: That was not this question at all.

Mr. HARWOOD: Oh, I misunderstood the question then, Your Honor.

The COURT: He was not assuming upon just the bare statements of the witness made this morn-

(Testimony of C. E. Lewis.)

ing, I suppose he is taking into account all of the testimony that has gone before in this case. I will overrule the objection, and you may answer the question.

Q. You may answer the question, yes or no, Mr. Lewis?

A. No.

Mr. HARWOOD: May we have an exception, Your Honor?

The COURT: Certainly. [328]

In 1934, and in past years, that portion of the irrigation system deriving its water supply from the Little Big Horn River, Lodgegrass Creek and its tributaries and the ditches and the river channels, were of sufficient size and capacity to carry all of the waters that were needed for irrigation purposes and that flowed in the Little Big Horn River during the months of July and August of last year and of each irrigation year, to irrigate the lands needing irrigation lying under the Project.

The water shortage which I have testified to, which occurred during the first of June and continued increasingly, reduced crop yields generally. This shortage of water had the result of stunting crop growth. The crops of farmers who had used water during the irrigation season whose lands were located under the Reno Ditch and under the Agency Ditch did not appear as good as the crops of those farmers using water under the Tschirgi Ditch and under the Belken-Campbell Ditch.

(Testimony of C. E. Lewis.)

Cross Examination
of C. E. LEWIS

By Mr. BURKE:

During June, July and August I made measurements of the Bozeman Trail Ditch. The first measurement was on July 2, 1934. The amount was 24 second feet. The next measurement was July 7, 5 second feet; the next measurement was August 21, 2 second feet. I did not make any measurements of the amount coming down the Little Horn River before there were any diversions on the dates that I took the Bozeman Trail measurements. I also made measurements at the second bridge south of Crow Agency. I made one measurement out of the Forty Mile Ditch. Those are the only measurements that I made between the bridge across the Little Horn going to Lodgegrass, on the Little Horn itself, down to Crow Agency. On July 5 I measured 14 second feet in the Forty Mile. On July 14 I measured 35 second feet in Upper Little Horn No. 2. [329] When the water was being rotated the private people rotated to some extent with the Government ditches. During rotation the Tschirgi Ditch was closed down with the others. I have here the dates of rotation submitted by the ditch rider. The water was in Upper Little Horn Ditch No. 2 until July 3, and then it was out until July 11; and it was in the ditch until July 16, when it was out; and then it was in the ditch again from July 24 until 31; and then it was in August 7 to August 16, and Septem-

(Testimony of C. E. Lewis.)

ber 6 to September 10. The Tschirgi Ditch was partially shut down during the same time the Upper Little Horn No. 2 was shut down. I cannot state that the Campbell-Belken Ditch was shut down. At this time there were about 2 or 3 second feet of water running in the Tschirgi Ditch. There was also some water running in the Upper Little Horn No. 2 at that time. After we started to rotate the Miller ditches were not shut down all the time. At times there was a head of water in them. After we started to rotate the Millers did some irrigating. While I happened to go up Lodgegrass Creek on July 30 there was a head of water in the William Miller Ditch, about 4 second feet. This is determined by the use of a current meter. All of the measurements were recorded on the meter except the ones I estimated.

The Indian owned land under the Agency Ditch is 4708.84 acres; the Reno, 2658; Forty Mile, 791.46; Upper Little Horn No. 2, 1755.63; Bozeman Trail, 1881.49; Lodgegrass No. 1, 3680.24; Lodgegrass No. 2, 1576.48. Totaling 17,052.14 acres of Indian owned land in this area of the Project. This acreage is susceptible to irrigation.

The number of acres of Indian owned land which was actually irrigated in 1934, taken from the 1934 crop report, is as follows: Under the Agency Ditch, 1514 acres; under the Lodgegrass, 846 acres; under the Upper Little Horn No. 2, 784; under the Forty Mile, 165 acres; under Lodgegrass No. 2, 210

(Testimony of C. E. Lewis.)

acres; under Bozeman Trail, 990 acres; under the Reno Ritch, 1100 acres. [330]

The number of acres of white owned land actually irrigated in the same units in 1934 is, Agency Ditch, 773; Reno, 596; Lodgegrass No. 1, 286; Upper Little Horn No. 2, 999; Forty Mile, 146; Lodgegrass No. 2, none. I do not know what the figure was for the Bozeman Trail.

Under my jurisdiction there was no difference made under the different ditches in the distribution of water in 1934 as to the various growers or land owners. The policy we follow is that every acre of land that is under the ditch would be given the same share of water as any other piece of land. The land owner, to secure water, makes a request to us for the area to be irrigated and specifies the time he wants it. We have no measuring devices and the amount of water which goes to each individual land owner who makes such a request is left to the judgment of the ditch riders. Most of the headgates are locked. Every day during the irrigation season the ditch rider checks the amount of water that is being used by individual land owners. The ditch riders check the waste water. There has not been any waste water except the small amount of water that might get away during irrigation. There was very little water, if any, wasted in the Government projects above Reno and Crow Agency. If we have water available we give the farmers an inch

(Testimony of C. E. Lewis.)

to the acre. In 1934 there was no difference between what was given on the Forty Mile per acre and what was given down below. There was a greater reduction on the lower part of the system in crop yields. The reduced yield in the lower part of the ditch was due largely to the shortage of water.

The Pitsch Brothers had a very good crop. One of these brothers is located under the Agency and one under the Reno. They did not have a lot of water available but still they had a good crop. Fred Deines had a very good crop in 1934. There was a good yield on the Frank Benzlow land located under the Agency Ditch. [331] Oren Weir had land under the Agency Ditch in 1934. There was a difference in the distribution of water to Oren Weir, Frank Benzlow and the Pitsch boys. That was because of the fact that the water was short. They did not have enough water to run through the ditch. Benzlow got more water because he was further up on the ditch. Bezlow is located about 9 miles from the lower end of the ditch. Pete Vandersloate is located at the lower end of the ditch. His crop was not as good as it had been.

As far as I know there was an efficient use of the water by the farmers on the Agency and Reno Ditches. Water was first turned into the Agency Ditch April 26, 1934; in the Reno Ditch April 25, 1934; in the Upper Little Horn Ditch, April 29, 1934; in the Forty Mile Ditch, May 4, 1934; in the Lodgegrass No. 1 Ditch, May 4, 1934, in the Lodge-

(Testimony of C. E. Lewis.)

grass No. 2 Ditch, May 1, 1934. There was no demand to my knowledge made by any of the farmers on the ditch for the turning in of water earlier than the day on which I turned it in. The spring of 1934 was dry. There is a possibility that if the water was turned in earlier than April 25 the water would have gone in the ground and formed a reservoir. I imagine it was about September 30 that the water was turned off in the ditches.

I believe it is considered good farming practise to saturate the ground in the fall and put water on it in the spring so as to create a water reservoir in the soil itself. In case operation and maintenance charges are paid at the present time, in 1935, we are permitting water to be used earlier than in other years, to create the same reservoir in the soil.

This shortage or reduction in yield was due entirely to the diversion of the private owners. Even though the soil had been saturated, as good farming practise requires, I think it would have taken as much water in June, July and August to raise a crop as it would have had there been no early season [332] irrigating, for the reason that atmospheric conditions were such as would take out all of the moisture. If they had irrigated in the spring it would all have been gone by July and August.

Fred Deines is under the Agency Ditch. He is about two miles from the upper end. That would make him about eleven miles from the lower end. The acreage in crop under the Tschirgi Ditch in

(Testimony of C. E. Lewis.)

1934 according to my data was about 2000 acres; 731 acres of Indian land irrigated. The acreage of the Antler Land Company in 1934 was 453 acres. The figures for ultimate irrigable acreage given by me take in only Government ditches, which includes all of the acreage under the Bozeman Trail Ditch. There might be a small amount of this acreage which I have classified as ultimate irrigable, that because of the unsuitable topography and condition of the soil is not actually irrigable.

Cross Examination of C. E. LEWIS

By Mr. JOHNSTON:

On June 18, 1934 by my measurement, there were 4 miner's inches of water flowing in the Dethlefsen Ditch. This measurement was made about a quarter of a mile below the diversion. On July 5 I estimated the flow 2 second feet. On July 14—2 second feet. On July 20—1 second foot. August 7 and August 31—4 miner's inches. In pro rating the water in 1934 I made no distinctions between water delivered to the Indians and water delivered to the white users under Government ditches. No difference is made in water distribution to white land owners and to white men who are lessees of Indian lands. The following acreage under each unit covers the Indian owned land irrigated by Indians themselves during 1934: Agency unit, 186; Reno, 173;

(Testimony of C. E. Lewis.)

Lodgegrass No. 1, 36; Upper Little Horn No. 2, 54; Forty Mile, 45; Lodgegrass No. 2, 73; Bozeman Trail, 20. The tributary streams below the point where I had established measuring devices in Lodgegrass Creek and the [333] Little Big Horn River were practically dry in the summer time when these measurements were taken.

Cross Examination of C. E. LEWIS

By Mr. TANSIL:

On June 18, July 24 and August 3, close to the south boundary of the Yates property I made an estimate of the flow of water in the Yates' Lodgegrass Creek Ditch. It was 5 miner's inches. There was no water in Percheron Creek at those times.

Redirect Examination of C. E. LEWIS

The owners under the Tschirgi Ditch rotated these waters after this action was commenced on June 20, 1934. The first rotation was done voluntarily. Two other rotations under the Tschirgi Ditch were ordered by the Superintendent of the Reservation and enforced by the Indian police. I was informed of this by the Superintendent. There was no difference in the methods of irrigation last year and the methods of preparation of the soil and the character of the soil than the method that had been used in previous years by the farmers under

(Testimony of C. E. Lewis.)

the ditches. The soil was the same last year as in past seasons. No water was measured out by any ditch rider to any farmer under these private diversions. The Commissioner of Indian Affairs directed me to measure this water out to the Indians and white men under Government owned ditches.

L. R. COOL,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I live in Hardin, Montana and am employed by the Holly Sugar Company. I have been so employed as field man for 7 years. I at present have part of the Hardin territory and the [334] Little Horn as far as Lodgegrass. My duties principally are to help the farmers grow beets. In 1932 I started on the reservation and came as far as Garryowen. That is under the Reno Ditch. That was my first year. Last year was the first year that I had the Agency Ditch. I also had the Reno Ditch and Lodgegrass No. 2, and in 1933 I had the Wyola territory.

During the irrigation season of 1934 we were short of water at times in this territory under the Government ditches which I covered. Some of my farmers did not have enough water to get their beets up. Some of them were very good farmers. Mr. Pitsch at Crow abandoned 23 acres. He had

(Testimony of L. R. Cool.)

put in more beets than he figured he had water for.

The first year that I was there, in 1932, the average yield for beets under Lodgegrass No. 1 was 13.6 per acre. In 1933 it was 9.9; and in 1934, 7.4; under the Reno Ditch, in 1932, was 14.5; in 1933, 12.3; in 1934, 8.7; Agency Ditch in 1932 was 14.9; in 1933 was 11.1; in 1934 was 8.9. In 1934 under the Lodgegrass Ditch there were 160 acres of sugar beets abandoned; under the Reno Ditch there were 79 acres abandoned; and under the Agency Ditch, 143 acres. From July 1st on in 1934, Lodgegrass Ditch as it comes over into the Little Horn Valley was dry practically all of the time. I went up above the point of diversion of Lodgegrass No. 2 with Mr. Lewis and saw one private ditch carrying about 4 second feet of water. This was either the latter part of July or the first of August.

Cross Examination
of L. R. COOL

By Mr. JOHNSTON:

We had a little hail storm in the Lodgegrass district in 1932, but it did not affect the first beets very much. There was no hail on any of the land under these other ditches. There was no hail storm to speak of in either the [335] Lodgegrass or Little Horn districts in 1933. There was mighty little of the white fly, or Idaho fly in that territory in 1934. There was no damage done by grasshoppers in 1934. The 1934 crop was put in late because of trouble

(Testimony of L. R. Cool.)

over the act of Congress with reference to sugar. Most of the beets were planted quite a while after the first of May. It is true that the earlier the planting the better, and we do get better tonnage, but we hardly ever have any beets planted before the first of May.

It is much better to irrigate beets up. They get evener germination by irrigation. Fred Benzlow, according to my data, had an average of 12.3 tons per acre. Dave Pitsch had the same average, and Mr. Deines had 13.4. It is a little over their 1933 average. In 1933 Benzlow had 13.2; the Pitsch Brothers, 16.4, and Fred Deines had 14 even. These men have their land in better shape than most of the farmers. They irrigate day and night. The factory average for the Holly Sugar Company in Sheridan was lower in 1934 than in 1933. It was a little over a ton per acre lower. It might help to soak the ground early in the spring and late in the fall. Every year there is approximately 10% of the beet acreage planted and abandoned. Lodgegrass Ditch No. 1 was dry in 1934.

Redirect Examination
of L. R. COOL

By Mr. BROWN:

Last year the acreage abandoned was more than the average. It was about 25%; that is, Lodgegrass and Dunmore ditches, and that is under the Lodgegrass No. 1 Ditch. The beets require water most

(Testimony of L. R. Cool.)

during July and August. In 1932 Mr. Benzlow had an average of 17.7 tons; in 1933 13.2 tons. Mr. Pitsch had 20.6 tons in 1932. [336]

Recross Examination of L. R. COOL

By Mr. JOHNSTON:

It takes more water for the irrigation of beets than any other crops grown by farmers in this country. It takes from 3 to 6 irrigations, depending upon moisture conditions. Irrigation for grains takes place usually during the forepart of the season. The last irrigation for beets is about the first of September.

CHARLES SPENCER

was called as a witness in behalf of the plaintiff, and having been first duly sworn, upon direct examination by Mr. Brown testified as follows:

I have lived at Crow Agency, Montana since June 1931. I am Farm Agent in the Indian Service and have been since 1931. I have a degree of bachelor of science in agriculture from the University of Idaho. I have had practical experience in farming since I was large enough to pack a shovel. I was born and raised on a farm. I have irrigated, myself.

My duties at Crow are to assist the Indians in farming. During 1934 there were farmers under my direction actually farming land and getting water from the Government system in the Little Big

(Testimony of Charles Spencer.)

Horn valley. I supervise under the Reno and Agency Ditches. During 1934 there was very little spring run off. As the season progressed during 1934 the quantity of water in the Reno and Agency Ditches available for irrigation purposes, showed a very marked decrease. It became noticeable the forepart of June. Up until the first of June there was not much difficulty over water. After that it became more and more scarce, and on the 19th of June there was a marked shortage of water. On July 6th there was a regular fight on down there after the water. Shortly after that they commenced rotating the canals on the upper end of the project and the lower end. During the period that we did not [337] have water down there during the second rotation there was dust in the bottom of the Agency Ditch. Because of this shortage of water a good many of the crops were abandoned. In only two instances were any of the grain crops harvested among the Indian farmers in my district. Most of the Indian farmers got a first cutting on their hay crop. Three or four of them got a second cutting. There was no third cutting among any of them. If there is water available for irrigation during the irrigating season, practically all of these Indian farmers get two cuttings, and a good many of them, three. There was very little rain during irrigating season of 1934. Based upon my experience in irrigating, and the experience I have had in assisting the Indians with their farming operations, I would

(Testimony of Charles Spencer.)

say that it would require not less than a miner's inch per acre for the irrigation of an acre of ground on the Crow Irrigation Project.

Cross Examination of CHARLES SPENCER

By Mr. BURKE:

The most common method of measuring water is with a weir. We do not have weirs in the laterals leading to the different pieces of ground on the Little Horn Project. I have never had occasion to measure the amount of water used on the land in the Little Horn. I base my statement of the amount of water needed in the Little Horn upon my past experience in Idaho. I have had no actual experience in the actual measurement of water in Montana.

I have not kept a record of the water that is used on these Indian farms according to miner's inches. I can make a fairly accurate estimate from looking at the stream of water running through an irrigation ditch of the amount of water that is being used. This year there were approximately 1000 acres withheld for farming purposes by the Indians. There were approximately 173 acres irrigated by the Indians in the Reno unit. In my territory there were 359 acres of Indian irrigated land. There were approximately 180 acres of grain planted on that area last year. None of these Indians had any large

(Testimony of Charles Spencer.)

acreage of wheat. The largest acreage was approximtely 30 acres.

In 1934 it was not to be considered a normal year on the Little Horn Project. In 1931 there was also a shortage of water. I was up the Little Horn and Lodgegrass several times. [338] The Government projects were not unnecessarily wasting water. There was no noticeable waste by the farmers on those projects.

I inspected some 39 farmers along the Little Horn on July 17, 18 and 19, paying particular attention to the beet crops, and I would say that the beet crops were about equally well watered in the upper and lower country of the Little Horn at that time, that is under the Government projects as well as under Mr. Tschirgi's ditch.

Cross Examination
of Mr. SPENCER

By Mr. JOHNSTON:

After I graduated from college, and until I went to Crow Agency, I operated a farm for myself in Idaho.

Redirect Examination
of CHARLES SPENCER

By Mr. BROWN:

I went up the stream on July 17th and there were three farms under the Tschirgi Ditch at that time. In the Campbell-Belken Ditch there was a small

(Testimony of Charles Spencer.)

stream running, filling approximately 50% of the carrying capacity of their ditch.

I again went up the stream during the time the water was supposed to be turned down for our second rotation. There was no water in the Tschirgi Ditch. The Belken-Campbell Ditch was running at full capacity. In July the crops on the Belken-Campbell lands and the Tschirgi Ditch appeared to be in better condition than the crops of Indian farmers under the Agency and Reno Ditches. On the 19th of June some of my Indian farmers might have obtained water, one or two of them, but there certainly was not enough water for all of them.

W. B. PLIMPTON

was called as a witness in behalf of the plaintiff, and having been first duly sworn, upon direct examination by Mr. Brown, [339] testified as follows:

I have lived at Crow Agency for the past 9 years, and am employed in the Indian Service as a Field Clerk. I have been so employed since 1931. My principal duties are looking after the details of the crop share leases on a portion of the Crow Reservation. I negotiate the leases, collect the Indians' share of the grain and other crops, and handle the sale of their crops. I deal with that portion of the lands owned by Indians under the Agency Ditch that are leased to white parties.

(Testimony of W. B. Plimpton.)

Beginning at the planting season I start to make a field survey of the number of acres in various crops on these share leases. During the summer I collect additional information, and, of course, when the final settlement is made in the fall I complete my record.

During the season of 1934 I went out on to this land under the Agency Ditch at the time the planting was made. Principally beets, wheat, oats, barley and alfalfa hay were planted on these leased lands. About the first part of June we began having complaints from the tenants that they were unable to get sufficient water to irrigate their crops. These complaints became more frequent, and during the first week in July a large delegation of farmers under the Agency Ditch called at the office to see the superintendent and see if anything could be done to relieve the situation. As these complaints became more numerous I made a special trip all through the district to see the actual condition of these growing crops.

I followed the canal to the headgates and found that boards and canvas had been put in to take every available drop of water, and that the ditch was probably 4 feet lower than I had ever seen it before. That would be on July 6th. This shortage of water was causing the crops to burn and no growth [340] apparent from the condition. There was very little water available for irrigation at this time and every bit was being used. As I surveyed

(Testimony of W. B. Plimpton.)

this district I saw no indications of water being wasted, and on the 14th of July I made a trip up the Little Big Horn valley with Acting Superintendent O'Hara to see if arrangements could be made with the other ditches to secure better cooperation in alternating use of the water. I observed the Campbell-Belken Ditch. There was water running in it to about half of its capacity. I observed the Tschirgi Ditch which was carrying practically all the water it would hold.

Practically all of the leased acreage under the Agency Ditch was planted to crops. Considerable was abandoned because of the inability to get water on it. This shortage of water caused the yields to be materially reduced per acre, and in several instances the Indians became so dissatisfied with the showing made on their lands that they demanded cancellation of these leases.

According to my records, the average per acre yield of beets for 1934 on leased Indian lands under the Agency Ditch was 8.9 tons per acre. For hay, 2.2 tons per acre. For wheat, 17.12 bushels per acre. For oats, 17 bushels, barley 34.5 bushels. In 1933 the average yield of beets was 11.01 tons. Wheat 20.72 bushels per acre. Oats 21.88. Barley 21.58. Alfalfa hay 2.57. Native hay .77 tons. For 1932 beets 14.09 tons. Wheat 25 bushels. Oats 35.19. Barley, 32.59. Alfalfa hay 2.15 tons. Native hay 93 tons.

(Testimony of W. B. Plimpton.)

Cross Examination
of W. B. PLIMPTON

By Mr. BURKE:

On my inspection trip on July 16th I found certain crops in the Agency district which had not been irrigated at all. I found other crops that had been irrigated once. There were [341] no crops that had been irrigated three times.

Certain crops were abandoned by the first of July and later. Some of them had received water before the 1st of July, not more than one irrigation. On this acreage of Indian land leased to whites, the character of crops which were abandoned were 142 acres of beets, 32 acres of wheat, 10 acres of barley, 58 acres of oats and 15 acres of alfalfa. The beets which were abandoned had a fair stand in the spring. In some instances they were irrigated up.

JAMES J. SLOAN

was called as a witness in behalf of the plaintiff, and having been first duly sworn, upon direct examination testified as follows:

I have lived at Crow Agency since 1920, and am employed by the Indian Department there as a Field Clerk, and have been so employed since 1932. My duties are the same as those of Mr. Plimpton. I have the Reno district, the Lodgegrass district and the Wyola district. The Wyola district is under

(Testimony of James J. Sloan.)

Upper Little Horn No. 2 and Forty Mile, and part of the Bozeman Trail. The principal crops raised under those ditches are beets, hay, wheat, oats and barley.

I observed a shortage of water about the 1st of June, 1934. As the season progressed this condition of shortage increased. In Lodgegrass Creek the shortage commenced about the middle of June. There were a great many demands made for early water because of a large acreage under Lodgegrass being in hay. We did not have enough water in the ditch and in the stream to meet these demands. After the first irrigation there was no water to fulfill the demands.

The shortage of water for irrigation reduced the [342] crop yield in the Lodgegrass area about 50%, that is Lodgegrass No. 1 and 2.

During the month of July I visited the Belken-Campbell Ditch and it was over-flowing. There was only a normal amount of water flowing in the Tschirgi Ditch. About ten days later I again visited the Belken-Campbell Ditch and saw about half of what had been flowing the time that I was up before.

Cross Examination
of JAMES J. SLOAN

By Mr. BURKE:

My records show 160 acres of beets abandoned in the Lodgegrass district.

D. W. CHANDLER

was called as a witness in behalf of the plaintiff, and having been first duly sworn, upon direct examination by Mr. Brown, testified as follows:

I have lived at Lodgegrass, Montana since 1918 and am employed as a ditch rider by the Government Irrigation Department under the supervision of Mr. Lewis. I cover Lodgegrass No. 1 and 2 and Forty Mile. During the irrigation season I am required to go over each ditch as often as I can. We are supposed to cover them every day, but that is impossible. I was out every day during the irrigation season of 1934.

From May on in 1934, the quantity of water flowing in Lodgegrass No. 1 and 2 diminished very fast. I observed that there was not sufficient water in Lodgegrass No. 1 and 2 the first part of June to irrigate the crops that had been planted that spring, or to go over the land. Lodgegrass Ditches Nos. 1 and 2 dried up completely during the irrigation season. This occurred in July and August. We did not have near enough water for the area under the Forty Mile Ditch. [343]

I noticed this shortage during the latter part of June and around the 1st of July. Later on due to this shortage of water, I closed down these upper ditches when the water was used in the Agency and Reno Ditches, and then when they would take it out at Wyola I would catch what was coming by. That left me one little stream. This shortage of water cut down the yield of crops under Lodgegrass Creek No. 1 and 2 about 50% of the average, and under the Forty Mile about 40%.

(Testimony of D. W. Chandler.)

On Lodgegrass 1 and 2, and on Forty Mile the farmers permitted some of their crops to go unirrigated so that they could use water to irrigate other crops. This was especially true on Lodgegrass No. 1.

During the first part of June I went up to the Miller Ditch and to the Dethlefsen Ditch, and observed that there was water running in those ditches. At the time there was water running in those ditches there was a shortage of water in Lodgegrass 1 and 2.

Cross-Examination of D. W. CHANDLER

By Mr. BURKE:

This 50% loss is based upon an estimate comparing the yields in 1934 with other years. This yield was cut down 50% because of the lack of water over other years. If we had had water in 1934 we would have had the same amount of crop as in 1933. There was a small stream of water in the Forty Mile all the time. I used that because it would not come on down far enough to do the Reno or Agency any good. This small stream amounted to about two heads of water.

There is no considerable loss of water in Lodgegrass No. 1 as it swings over to what we call Good Luck Creek, until it strikes the irrigated country on the Little Horn. There is some loss through seepage. There was sufficient water in [344] Lodgegrass No. 1 in 1932. In 1933 we were short. Over a ten year period there were about 3 years out of

(Testimony of D. W. Chandler.)

the ten that there was not sufficient water in Lodgegrass No. 1 to carry it across the divide to water on the Little Horn.

The Miller Ditches shut down for a period of time. After they shut down there was not sufficient water to carry it across the divide over on the Little Horn. The lower end of Lodgegrass Ditch No. 1 was dry in July. The Millers were still irrigating their garden. They had pretty good heads of water running then. But they used the water mostly for irrigating gardens and for stock water. There was no demand made upon me for water before I turned it out in April 1934, nor was there any demand made for water after the close of the irrigation season in 1933.

Redirect Examination
of D. W. CHANDLER

By Mr. BROWN:

If the headgate that I had set had been raised I could tell that on my next trip to that headgate. After the commencement of the irrigation season the farmers make demands on me if they want water, and I adjust their headgates accordingly.

Cross-Examination
of D. W. CHANDLER

By Mr. BURKE:

I do not think it takes any more for beets than alfalfa. We did not have any waste water running off the land. I pay attention to this.

OTTO BEAR GROUND,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I am a member of the Crow Tribe of Indians. I have lived at Crow Agency, Montana all of my life. I have been [345] Chief of Police there for two and one-half years.

On July 15, 1934, under instructions of Mr. O'Hara, Superintendent in Charge, I closed all of the headgates of private diverters on the Little Big Horn River. On July 15 I went up to the Belken Ditch on the Little Big Horn River and observed the ditch as being "plumb" full of water and the gates wide open. I then closed the headgates. I was up there about eight days keeping these private headgates closed. I did not have much success in keeping the Campbell-Belken Ditch closed. As soon as I closed the headgates on this ditch and left, they would open them wide again.

JOE TOMLINSON,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I have lived at Crow Agency since 1910. I do farming and carpentering work. I own a farm which is under the Agency Ditch. I raise grain, alfalfa,

(Testimony of Joe Tomlinson.)

sugar beets and beans. Dave Pitsch farms my place on shares, but I lived there in 1934. That year the water available for irrigation began to fall off. Towards the last of May I noticed the shortage. From that time on we were short considerable of the time. This shortage of water reduced the yield of all of our crops.

In 1934 the beets on my land made 12.32 tons to the acre; and barley, 42; wheat 19.5; alfalfa .95 ton per acre oats 60 bushels. In 1933, beets were 16.4 tons per acre barley 80 bushel; wheat 33 bushel; alfalfa 4½ tons; oats 115 bushels. In 1931 the beets yielded 17.85 tons per acre. My lands were in as good farming condition in 1933 as they were in 1934.

I went up the river on August 2 and observed [346] the Campbell Ditch and his lands. He had a man out irrigating alfalfa and he seemed to have a little more water than he could handle. On the 5th I saw men irrigating a beet field on the Tschirgi lands. In 1934 I abandoned 9 acres of beets because we were short of water.

Cross-Examination
of JOE TOMLINSON

By Mr. BURKE:

I evidently made a mistake about the beet yield in 1931. That was a year they went on a strike and did not raise any beets. At the time I saw Belken, Campbell and Tschirgi using water that was after they started to rotate. In 1934 some of the beets

(Testimony of Joe Tomlinson.)

were irrigated four times and some 9 acres were irrigated once, which we abandoned.

Cross-Examination
of JOE TOMLINSON

By Mr. JOHNSTON:

I bought my land from the Department of the Interior at Government land sales in October, 1928. This land belonged to dead Indians.

Redirect Examination
of JOE TOMLINSON

By Mr. BROWN:

I paid $62.50, I believe, an acre for this land.

H. A. PECK,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

With the exception of a few years, I have lived on the Crow Indian Reservation since 1916. I am employed as a ditch rider by the United States Indian Irrigation Department under the [347] supervision of C. E. Lewis. In 1934 I rode the Agency Ditch. During the last days of May we canvassed the dam at Crow Agency to catch all of the waters. The water got lower after the first of June.

The bulk of the grain was irrigated sufficiently in May to make a crop. Because of the lack of water there were several pieces of sugar beets

(Testimony of H. A. Peck.)

abandoned and the tonnage generally was smaller than if they had had more water. The average yield of grain on this area was 15.83 bushels per acre; for beets, 6.55 tons per acre; hay, 1.75 tons. These averages are based upon figures I get from the farmers, which is part of my duties. For 1933 the average yield for beets was 11 tons; for grain 20.46 bushels; for hay, 2.08 tons.

On July 14th I was up at the Campbell Ditch. It was running half capacity. The next day I saw water running in the Tschirgi Ditch.

Cross-Examination
of H. A. PECK

By Mr. BURKE:

There was no late fall or early spring irrigation in my unit. I try to divide the water equally between the different land owners when they ask for it. The lack of water was responsible for the poor crops. During the month of May there was plenty of water for the wheat crops on my unit, and there was sufficient water during that month for beet irrigation. Dave Pitsch told me the reason he abandoned part of his beets was because water was going to be a little short and he did not have an extra good stand.

Cross-Examination
of H. A. PECK

By Mr. JOHNSTON:

In some instances the cause of some farmers having poor crops was that they were poor farmers.

[348]

(Testimony of H. A. Peck.)

Redirect Examinaiton
of H. A. PECK

By Mr. BROWN:

In May I turned out water to all farmers who made a demand for it. This condition did not hold true in June, July or August.

FRED DEINES,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I have lived at Crow Agency for 12 years. I am a farmer. I own 62 acres and lease 80 acres of Indian land under the Agency Ditch. My land was in excellent condition for farming in 1934.

About the 5th of June I noticed the water in the Agency Ditch going down, and my boy made a request of the ditch rider for water. We were notified it would take four or five days before we could receive any. We then let the hay and grain burn up because we knew we would not get any more water, and we wanted to save all the water we could get for our sugar beets. During the latter part of the season there as no water in the Agency Ditch. For the hogs and chickens I had to lower my pump 4 feet in my well.

In 1934 I got from 17.76 acres of beets, 212 tons, 965 pounds. From 10 acres I got 240 bushels of wheat; 711 bushels of barley from 22 acres. This

(Testimony of Fred Deines.)

was from the leased acreage. From my own place I got 767 bushels of barley from 12 acres; 75 tons of alfalfa from 20 acres. From 15 acres of beets I got 180 tons, 1370 pounds.

About the 5th of June I got word that the water was not going to hold out very strong so we just doubled up and irrigated every foot that we thought could stand it.

For 1935 from the leased acreage I got 60 ton of hay from 20 acres. From another 20 acres I got 700 bushels of barley; 20 acres of beets, 253 ton, 1397 pounds. On my own place I got 74 tons of hay from 20 acres; 340 bushels of wheat from 12 [349] acres; 90 tons of beets from 6 acres; 90 tons of beets from 10 acres.

Cross-Examination
of FRED DEINES

By Mr. BURKE:

In 1934 I got three and one-half tons of hay per acre; 60 bushel of barley to the acre; a little better than 12 ton of beets per acre. If my neighbors had done the same in 1934 as I did, I think they would have pretty good crops too. I think some of them did. I irrigated at night but let the rest of them have the water in the daytime. Irrigating nights will give you a better crop than to scald it in the daytime.

ERNEST RICHARDS,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I am a farmer under Lodgegrass Ditch No. 1. I farm some of my own land and Indian leased land. The available water went down very fast between the 20th of May and the 1st of June. I irrigated first, before the 15th of May, and again between the 20th of May and the 1st of June. The third time there was not enough water available so I let my hay and grain go and tried to save my beets. I was able to save a part of my beets. We did not have any water about the 1st of July. The ditch was dry. There was no water available after the 5th of July.

This lack of water reduced my crop yield considerably, causing a loss of 50% on the grain, 80% on the alfalfa seed and 40% on the beets. Between the 10th and 15th of August I saw a small head of water running in Bob Miller's ditch.

EUGENE BOGGESS,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I am employed under the direction and supervision of Mr. Lewis and Mr. Hanna as a ditch rider on the Reno Unit of the Government Project.

I noticed that the water supply for this unit on June 1, 1934 was very short. There was not enough

(Testimony of Eugene Boggess.)

water in the ditch at that time to properly irrigate all of the lands that needed water from the ditch. From June 1st on, part of the time [350] there was no water in the ditch. We not only had to rotate the water between the various units or ditches of the Government system, but also between the various users out of this ditch. This shortage made the yield of the crops quite a bit shorter than if there had been plenty of water. The approximate shortage along the Reno Ditch was about one-third.

On June 6th I went up stream and examined the Henman Ditch and found it full of water.

Cross-Examination
of EUGENE BOGGESS

By Mr. BURKE:

The one-third loss I testified to was in everything, the total. The wheat was made in my district about the middle of June. In other years, like 1932 and 1933, they got one-third more crop than they did in 1934. This loss was caused by the shortage of water. All of the users in my district got an equal distribution of water.

Henry Pitsch is in my district. He had a good crop but not as good as if he had plenty of water.

Redirect Examination
of EUGENE BOGGESS

By Mr. BROWN:

I did not see any water being wasted on any of my trips down to the lower end of my unit.

(Testimony of Eugene Boggess.)

Recross Examination
of EUGENE BOGGESS

By Mr. BURKE:

Some of the farmers in my district got three irrigations during May. The others who did not get three irrigations were not ready for it.

HENRY PITSCH,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified [351] as follows:

I owned and farmed land under the Reno Ditch in 1934. Around June the water was very short. It kept getting lower and finally ran out after a period of time. There was not sufficient water to properly irrigate my lands.

In 1934 I made 12.35 tons of beets per acre. In 1933, 15.65 tons per acre. In 1932, 21.5 tons per acre. In 1934, oats, 52 bushels; 1933, 75 bushels; 1932, 125 bushels per acre. In 1934, hay, 2 tons per acre; 1933, 4 tons, and 1932, 5 tons.

The land I farmed in 1934 was the same land I farmed in 1932 and 1933. It was in better condition in 1934 than in 1932 and 1933. I suffered this reduction in crop for lack of water.

Cross-Examination
of HENRY PITSCH

By Mr. BURKE:

I gave some of my beets three and some four irrigations. I irrigated whenever I had the water.

OREN WEIR,

was called as a witness in behalf of the plaintiff, and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I farm land under the Agency unit of the Government Project. The water supply became so inadequate that we abandoned between 60 and 70 acres of grain. From most of my hay I just got one cutting. If the water supply had been adequate, as in 1933, I would have had three cuttings. The ditch was dry at my place for five weeks at one time.

Cross-Examination of OREN WEIR

By Mr. BURKE:

In 1934 I ran a store at Hardin, but I was out [352] at the farm every day.

In 1933 I believe I got 11.12 tons per acre on my beets. I did not give everything one irrigation in May because we could not get to it. It was along in June when they began to cut us down on the water.

Cross-Examination of OREN WEIR

By Mr. JOHNSTON:

I purchased my land from the Government at Crow, that is, at the Indian land sales. I think it was dead Indian land.

PETE WIEGAND,

as called as a witness in behalf of the plaintiff, d having been first duly sworn, upon direct exam- ation by Mr. Brown, testified as follows:

I farmed land during 1934 near Lodgegrass, ontana under Lodgegrass No. 1 of the Govern- ent Project. I also leased 180 acres of Indian nd. Because of the shortage of water after June t, I lost from 25% to 30% on beets, and about % of hay and a total loss on beans.

Cross-Examination
of PETE WIEGAND

y Mr. BURKE:

In 1934 I got about 10 tons of beets to the acre. 1933 about 11 tons. In 1934, 1½ tons of hay. In 33, about 3 tons. I got two irrigations for my ets in 1934, one about June 20th and the second out August 20th.

Redirect Examination
of PETE WIEGAND

y Mr. BROWN:

Some of the water that I got for the irrigation of y beets I got by pumping water out of the Little orn River, and not by gravity irrigation under odgegrass No. 1. [353]

(Testimony of Pete Wiegand.)

Recross Examination
of PETE WIEGAND

By Mr. BURKE:

The water that I pumped out of the Little Horn was taken out during the rotating season. I do not know whether or not that water was intended for me.

WILLIAM GENTRY

was called as a witness in behalf of the plaintiff. and having been first duly sworn upon direct examination by Mr. Brown, testified as follows:

I am a farmer under the Agency Ditch. I have farmed under this ditch for 15 years. I own 80 acres and have 160 acres leased. I irrigated all of my crops during May, 1934. From then on I did not have water to properly irrigate. At times there was no water. The water that I did get I used on the best hay land that I had. I abandoned some of the other land. This caused my crop to be one-third short.

Cross Examination
of WILLIAM GENTRY

By Mr. BURKE:

Both my hay and grain were one-third short over the year before. I got 182 tons of hay in 1933 and 122 tons in 1934. I had no shortage of water in May. My place is located 2 miles down from the main canal. I did night irrigating.

(Testimony of William Gentry.)

Redirect Examination
of WILLIAM GENTRY

By Mr. BROWN:

I did not irrigate my grain after the first time in May because of the shortage of water.

Recross Examination
of WILLIAM GENTRY

By Mr. JOHNSTON:

I bought part of this land from Robert Duncan, a white man. [354]

W. S. HANNA.

was re-called as a witness in behalf of the plaintiff, and having been previously sworn, upon direct examination by Mr. Brown, testified as follows:

There has not been during the irrigation seasons of 1931, 1932, 1933 and 1934 sufficient water to irrigate the lands lying under each of these ditches under this portion of the Government Irrigation Project here involved, the whole unit as now considered and designed for irrigation, cultivated and occupied. There has not been available during the years 1931, 1932, 1933 and 1934 sufficient water all during the irrigation season for use in this portion of the irrigation system involved in this action, to adequately irrigate the lands actually occupied and cultivated during each of these years.

(Testimony of W. S. Hanna.)

Cross Examination
of W. S. HANNA

By Mr. BURKE:

There have been times during each of the years named, when there was not enough water available to properly irrigate the 8400 acres I testified were under irrigation in 1934. During each of these other years, as I remember it, there were times that we got short and had to rotate. This might mean that the crops were not properly irrigated. There were some losses suffered each of those three years. We had complaints on not getting enough water each of those three years. There was not enough water to supply demands as they were made, except by the rotation system, and then we had to make a man wait until we could deliver it to him under the rotation system. Under our system we operate on a demand basis until there is a shortage, and then we make them wait for the water. With an unlimited supply of water it is true that you can give everyone a head under the rotation. And they can cover the ground quickly, but this is not true in our system.

The amount of water in the Lodgegrass and Little [355] Horn River during 1934 to supply these 8000 acres of land would be 40 times those second feet flows that Mr. Lewis found, with the variable for each reading period. The capacity of the Alliance Ditch (Tschirgi Ditch) is approximately 30 second

(Testimony of W. S. Hanna.)

feet; of the Belken-Campbell Ditch, approximately 10 second feet.

The cost of construction up to December, 1934 taken from page 30 of my 1934 Annual Report on these various units, is: Agency Ditch, $151,984.14. Reno, $96,817.38. Lodgegrass No. 1, $113,195.88. Lodgegrass No. 2, $55,385.84. Forty Mile, $12,621.19. Little Horn No. 2, $134,700.67. The part we paid on the cost of construction of the Bozeman Trail Ditch is $24,004.51.

With a low head of water last year according to measurements taken by Mr. Lewis, there was between 60% and 70% loss of water in transit in the Little Big Horn River between the headgate of Upper Little Horn No. 2 down to the headgate at Crow Agency. A much less proportion of loss would result in case a large head of water is flowing. We need an inch per acre at the source to take care of all of our land. There was a loss of about 65% last season from the time the water left the headgate of Upper Little Horn No. 2 until it reached the land at Crow Agency. If we would take an average for the season I would say we would have a loss of 45% to 50%. There is a considerable loss in getting the water down the river. There are 100 miles of river to get it down to the Agency and Reno units. There is no greater loss in Lodgegrass No. 2, on the average, than for any other canal on the Project. There was a survey made of a ditch designated as Lodgegrass No. 3 on the same location

(Testimony of W. S. Hanna.)

as the Robert Miller Ditch is now located, but there was never any construction done and no money spent on it since my time. I think the Government made a survey of the ditch now known as the Herman Ditch. One of your exhibits will show that there was 200 miles of level lines run in the Little Horn valley when they were determining what ditches they would build. And most of those ditches were not built at that time. They were abandoned. We never had any authority [356] to build a ditch there. They were surveys made for study purposes at the time they were deciding where they wanted to build ditches.

Redirect Examination
of W. S. HANNA

By Mr. BROWN:

The figures which I gave you for each of the ditches, included the original cost of the construction of the ditch, except in the case of the Reno Ditch. I do not believe that the $8000 or $9000 cost of the Reno Ditch is in that item. Those figures do not include operation and maintenance.

Examination of Mr. HANNA by the COURT:

The COURT: Mr. Hanna, in the early stages of irrigation on the Reservation, at the beginning of this project, when the surveys were being made and plans made, etc. and the Government appropriated funds for that purpose, weren't they reimbursable out of the Crow funds?

(Testimony of W. S. Hanna.)

A. I believe not at that time, Judge. They were made reimbursable under the Act of August 1, 1914, I think.

The COURT: All right.

A. I might modify that, though, by saying that along from 1914 to 1918 we had appropriations that were reimbursable to the Treasury and from then on to about 1924. The Public Notice figures, which were given in one of these exhibits, gives the division of the construction cost expenditures, shows about a million six hundred thousand, out of tribal moneys, a certain amount of gratuity money, that was appropriated as gratuity money, and a certain amount of reimbursable that was used.

Recross Examination of W. S. HANNA

By Mr. BURKE:

The operation and maintenance cost in 1934 was $1.00 per acre. It was the same in all of these units. The operation and maintenance charge varies a little bit from year to year. It is based on actual costs

Plaintiff rests.

(Testimony of C. E. Lewis.)

Thereupon the following evidence was introduced by the defendants upon their case in chief:

C. E. LEWIS

was recalled as a witness for the defendants, and having been previously sworn, upon direct examination by Mr. Johnston, testified as follows:

W. H. Spear diverts from Pass Creek, a tributary to the Little Big Horn River. The Bozeman Trail Ditch and Upper Little Horn No. 2 are above the confluence of Pass Creek with the Little Big Horn. The point of diversion of the Red Gap Ranch, Incorporated, ditch is above the point of diversion of all Government ditches. The point of diversion of the Bozeman Trail Ditch is below one of our Government ditches, Upper Little Horn No. 2. The Frank M. Heinrich Estate irrigates its land through the Robert [357] Miller Ditch, the diversion point of which is above all the Government ditches on Lodgegrass Creek, and above some of the Government ditches on the Little Horn River. The Dan Sullivan Ditch comes out of Pass Creek.

At this point counsel for the plaintiff objected to this line of examination as incompetent, irrelevant and immaterial, and not within the issues. The further objection was made that this matter had all been passed on when the Court ruled on the motion as to who should be parties defendants, which motion came on for hearing and by order filed by the Court on April 12th, the Court denied the motion. Thereupon the following offer of proof was made

(Testimony of C. E. Lewis.)

by Mr. Johnston of counsel for the defendants, which offer was denied by the Court:

Mr. JOHNSTON: If the Court please, we now offer to prove by Mr. Lewis that in addition to the parties heretofore inquired about, V. Belle Spear, Don Hardy, Andrew Hoaglen, Caroline Hoaglen, Irma Powers, Claude V. Reed, J. P. Reed, D. B. Shannon, E. L. Dana, Fra Dana, and A Two Bar Cattle Company divert water from the Little Big Horn River or Lodgegrass Creek or some of their tributaries at the points of diversion above the points of diversion of all of the Government ditches, or a portion of the Government ditches.

DEFENDANTS DETHLEFSENS' EXHIBIT ONE Admitted

(Defendants Dethlefsens' Exhibit One is an original drawing showing a map of lands owned by Rose Peters, Arthur Peters, Elsie Peters, Alice Peters and George Peters. This exhibit has been certified to the Circuit Court of Appeals as a portion of this record.) [358]

(Testimony of C. E. Lewis.)

DEFENDANTS DETHLEFSENS' EXHIBIT SIXTEEN Admitted

C 327

"DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs,
Washington, May 28, 1890.

"James G. Hatchitt, Esq.,
U. S. Special Agent,
Hastings, Nebraska.

Sir:

"Having been directed to proceed to the Crow Reservation, Montana, on the 2nd of June, next, for the purpose of making allotments to the Indians located thereon, the following instructions are given for your guidance:

"The work of making allotments to these Indians was commenced in 1885, by Special Agent Milburn, under the Agreement of June 12, 1880, ratified by the Act of April 11, 1882, (22 Stats., 42). Late in August 1886, Col. J. R. Howard and John G. Walker, Esq., were appointed Special Agents to continue the work. During September and October they made some 125 allotments. In 1887, after the passage of the Severalty Act, it was determined to make the allotments under that Act, and on May 12, 1887, the President granted the requisite authority. July 23, 1887, James R. Howard, who had been appointed a Special Agent, under the Act

(Testimony of C. E. Lewis.)

of February 8, 1887, was instructed to proceed to the Crow reservation for the purpose of continuing and completing the work.

"During the season of 1887, he made some 452 and during the Summer and Fall of 1888, some 600 allotments, which are understood to include those made under the Agreement.

"The Allotment Act provides: "That where the treaty or Act of Congress setting apart such reservation provides for the allotment of lands in quantities in excess of those herein provided, the President in making allotments upon such reservation shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or Act".

"1. The allotments to the Crows are therefore made in quantities as provided in the Agreement, viz:

To each head of a family, 160 acres with an additional quantity of grazing land not exceeding one quarter section.

To each single person over eighteen years of age, 80 acres, with an additional quantity of grazing land not exceeding one eighth of a section.

To each orphan child under eighteen years of age, 80 acres, with an additional quantity of grazing land, not exceeding one eighth of a section; and to each other person (single) under eighteen years, born

(Testimony of C. E. Lewis.)

prior to making the allotments, 80 acres, with a like quantity of grazing land.

All members of the tribe, in being, during the time allotments are being made, (except married women) are entitled to allotments. [359]

"2. You will allow the Indians to select their lands, heads of families selecting for themselves and their minor children.

"3. Selections for orphans will be made by yourself and the Agent.

"4. Allotments should be made with reference to the best interests of the Indians, the choice portions of the reservation to be given to them, and care taken to see that they have every possible advantage which it affords.

"5. Every allotment should be distinctly marked with permanent monuments, and each allottee (of sufficient age) should be personally shown the boundaries of the allotments selected by him, so that he will understand exactly where the land selected by him lies, and every possible means should be taken to familiarize them with the boundary lines.

"6. The tracts given to each allottee should be contiguous, if possible, but an allottee may be allowed to select a detached tract, if it be necessary, in order to give him a proper proportion of farming and timber land, or for the

(Testimony of C. E. Lewis.)

purpose of properly distributing lands fronting on streams and water courses.

"7. Each Indian should be allowed to select his land so as to retain improvements already made.

Where the improvements of two or more Indians have been made on the same legal subdivision, a provisional line should be run dividing the land between them, as provided in section 2 of the Act, unless an arrangement can be made between them, by which the tract can be given to one of them. Such arrangement, however, must be satisfactory to all the parties.

"8. Indian women married to white men, should be regarded as heads of families. The white husbands cannot take allotments.

In all cases where Indian women have been married to Indian husbands and have children born of such marriage, but have been divorced from such husbands after the Indian custom, the mother should receive an allotment as the head of a family, and should be allowed to select land for her children, not under the charge of the father at the date of these instructions, if competent to do so.

Where a man and a woman are living together without the form of marriage, they should be treated as single persons and each given an allotment of 80 acres of agricultural and 80 acres of grazing land.

(Testimony of C. E. Lewis.)

"9. Where an Indian has a plurality of wives, the first wife should be regarded as the legal one, and the others allowed to take allotments as single persons. The status of such persons at the date of these instructions should be held as determining their rights.

"10. Orphans are children who have lost both parents, or who have no Indian parent living.

"11. A person who has children or other persons legally or morally dependent upon him or her for care or support, [360] and being in the same household, should be regarded as the head of a family.

"12. No person should be allowed an allotment on the Crow reservation, unless he is a recognized member of the Crow tribe, or his father or mother is, or was, a duly recognized member thereof.

"It is understood that most of the lands heretofore surveyed and which are desired by the Indians, have been allotted, although it is likely that some selections still remain to be made. This should be made the subject of inquiry upon your arrival at the Agency.

"Other surveys, in the portions of the reservation where the Indians are settled, have been contracted for, and are expected to be under way by the first of next month.

(Testimony of C. E. Lewis.)

"It is intended that you will follow the progress of this survey consulting the surveyor when necessary.

"You will prepare a schedule of the allotments made by you, each family being grouped by itself and the relationship of each member to the head, shown in the column of remarks. You will number the allotments consecutively commencing with No. 1053.

"The name of the wife (legal) should be entered in the schedule immediately following that of the husband, but she should not be numbered as an allottee.

"The age (at the time the allotment is made) and sex of the allottee should be given for the purpose of identification.

"Where persons have both English and Indian names, each should be given, and care should be taken to have the names properly spelled.

"The tracts should be designated as agricultural or grazing, as the case may be.

"The law requires the schedules to be in duplicate. They should be certified by both yourself and the Agent in charge of the Crow Agency.

"Your attention is called to the provisions of the Act with reference to religious societies or organizations.

(Testimony of C. E. Lewis.)

"A supplemental schedule will be prepared and submitted by you for the action of the Secretary of the Interior, under the provisions of section 5, showing the lands, not exceeding 160 acres in any one tract, occupied upon the reservation at the date of the passage of the Act (February 8, 1887) by any religious society or organization for religious or educational work among the Indians.

"You will also note upon this schedule all tracts occupied for Agency and school purposes.

"If desired by the Indians you will issue to each allottee a certificate showing the lands selected. Blanks for this purpose will be sent you as soon as a further supply is printed.

[361]

"You will do such retracing of lines and reestablish and establish such monuments as may be found requisite, employing a competent surveyor, and the necessary assistants who should be Indians in all cases where practicable.

"For such persons you will furnish proper vouchers and report the employes upon a "List of Irregular Employes". Such expenditure is limited to $1500.

"You will also employ an interpreter when absolutely necessary and report him upon your "List of Irregular Employes".

Testimony of C. E. Lewis.)

"These expenses are payable from the appropriation for Unfinished Allotments, Act of February 8, 1887, Reimbursable.

"While making allotments you will make every possible effort to induce the allottees to permanently locate upon their allotments.

"The work should be carried on with diligence and vigor and as rapidly as a due regard to thoroughness and accuracy will permit.

"Weekly report of progress should be made.

"I transmit for your use 50 blank township plats, and 50 blank allotment sheets and 30 blank weekly reports.

"I also transmit the schedules of allotments made by Special Agent Howard, (except the page containing the certificates). They should be returned to this office with your report.

"A copy of these instructions will be forwarded to Agent Wyman, with directions to afford you every assistance in his power.

Very respectfully,

Allen. R. V. BEET,

Approved, June 3, 1890 Acting Commissioner.

Secretary."

To this exhibit plaintiff objected as being incompetent, irrelevant and immaterial, simply an instruction to some allotting agent given him in 1890, entirely without the issues of the case, with no bearing upon the questions raised.

(Testimony of C. E. Lewis.)

The Court overruled the objection of plaintiff, and at the same time allowed this exhibit and all other exhibits introduced by any of the defendants in this case, to apply equally [362] to all defendants, to which rulings plaintiff was granted an exception.

DEFENDANTS' EXHIBIT SEVENTEEN.
Admitted

"Department of the Interior
Office of Indian Affairs
Washington

"Land
16417-1901 June 26, 1901
John K. Rankin, Esq.,
Special Allotting Agent,
Crow Agency, Montana.
Sir:

"The Secretary having, under date of March 26, 1901, designated you to make allotments to the Indians of the Crow Reservation in Montana, and this office having ordered you by telegram, on May 24, 1901, to proceed to the Crow Agency for that purpose, the following instructions are given for your guidance in the work:

"The work of making allotments to these Indians was commenced in 1885 by Special Agent George S. Milburn, under the agreement of June 12, 1880, ratified by the Act of April 11, 1882 (22 Stats., 42), who made, in October and November of that year, some 156 allot-

(Testimony of C. E. Lewis.)

ments. Late in August, 1886, Col. J. R. Howard and J. G. Walker were appointed Special Agents to continue the work. During September and October of that year they made some 125 allotments. In 1887, after the passage of the Act of February 8, 1887 (24 Stats., 388), it was determined to make the allotments under that act and on May 12, 1887, the President granted the requisite authority.

"July 23, 1887, James R. Howard, who had been appointed a Special Agent under said act, was instructed to proceed to the Crow Reservation for the purpose of continuing and completing the work.

"During the season of 1887 he made some 469, and during the summer and fall of 1888 some 585 allotments, which it was understood included those made under the agreement.

"April 5, 1890, Special Allotting Agent James G. Hatchitt was assigned the duty of allotting the Crow Indians as soon as the surveys were sufficiently advanced, and on June 3, 1890, the Department approved instructions for his guidance.

"In December, 1890, an agreement was concluded with the Crow Indians by which they ceded a considerable portion of their reservation, which Agreement was ratified by Congress March 3, 1891, (26 Stats., 989).

(Testimony of C. E. Lewis.)

"The act ratifying the agreement provided that any person who might be entitled to the privilege of selecting land in severalty under the provisions of the 6th article of the treaty of May 7, 1868, or under any other act or treaty, should have the right for a period of sixty days to make such selections in any part of the territory ceded by said agreement. [363]

"April 14, 1891, Special Allotting Agent Hatchitt was directed to assist such of the Crow Indians as desired to make selections under the foregoing provision.

"May 16, 1891, the Secretary assigned to him the duty of making allotments to the Yankton Indians and he soon after left the Crow reservation.

"Some 602 allotments were made by him on the Crow reservation, a considerable number being on the ceded lands.

"August 27, 1892, a supplemental agreement was concluded with the Crow Indians, by which it was agreed that the persons named in Schedule A, attached thereto, included all the members of the tribe who were entitled to retain allotments made to them on the ceded lands before the date of the agreement, and that Schedule B included all the members of the tribe who were entitled to the benefits of the 13th section of the agreement of December 8, 1890 (see Annual Report for 1891, p. 669) and

(Testimony of C. E. Lewis.)

the provision in the act of ratification above referred to.

"Schedule A contained 219 allotments and Schedule B 117, total 336.

"A large number of the allottees on each schedule have relinquished their allotments and are entitled to allotments on the diminished reservation. Those on either of these schedules who have not relinquished the allotments on the ceded lands are not entitled to allotments on the diminished reservation unless they should relinquish while you are engaged in your work.

"Copies of these schedules are on file at the Agency, and the records there should show which allotments have been relinquished.

"March 25, 1901, the President cancelled the Executive order of May 12, 1887, and authorized the making of allotments to the Crow Indians as provided by the Act of April 11, 1882, and for the surveys and resurveys necessary to complete the same.

"June 8, 1901, he modified the order of March 25, so as to authorize the making of the allotments as provided by the act of February 8, 1887 (24 Stats., 388), and the act of February 28, 1891 (26 Stats., 794), in quantities as specified in the act of April 11, 1882 (22 Stats., 42).

"During the last nine or ten years the construction of irrigating ditches has been in progress on this reservation, the intention being to

(Testimony of C. E. Lewis.)

give each Indian a sufficient quantity of irrigated land. The largest of these works is now in process of construction and the work has progressed to a sufficient extent, it is thought, to enable you to determine what lands can be irrigated from this canal.

"As to the quantity of irrigable land to be given each Indian, it is thought that 40 acres will be an ample quantity, but on this point you will consult with both Agent Edwards and Superintendent Hill, and this quantity may be increased if the total acreage will admit of a larger quantity being given. [364]

"It is desired that the former allotments (within the diminished reservation) be ignored as far as practicable, or at least readjusted so as to give all the allottees an equal quantity of irrigable land.

"Where former allottees have died it is presumed that under the ruling of the Department their heirs would be entitled to have the allotments confirmed. But it is not thought that this right would extend so far as to entitle them to have the selection confirmed, as made, thereby giving them, in some cases at least, a greater quantity of irrigable land than can be given to living allottees. In such cases, therefore, where the lands contain a greater quantity of irrigable land than is adopted as a quota, the heirs should be required to readjust the selection so as to conform to the present instructions.

(Testimony of C. E. Lewis.)

"Allotments are to be made in quantity as follows:

"To each head of a family not more than one quarter section, with an additional quantity of grazing land not exceeding one-quarter section.

"To each single person over eighteen years of age, 80 acres, with an additional quantity of grazing land not exceeding 80 acres.

"To each orphan child under eighteen years of age, 80 acres, with an additional quantity of grazing land not exceeding 80 acres; and to each other person (single) under eighteen years of age, born prior to making the allotments, 80 acres, with a like quantity of grazing land.

"These quantities are fixed by the agreement.

"To each married woman, 80 acres of agricultural, or 160 acres of grazing land, as provided by the act of February 28, 1891 (26 Stats., 794).

"In other words, each head of a family is entitled to 160 acres of agricultural and 160 acres of grazing land, and each other member of the tribe (except married women) to 80 acres of agricultural and 80 acres of grazing land, and each married woman to 80 acres of agricultural, *or* 160 acres of grazing land.

"All members of the tribe, in being at the time of making selection, are entitled to allotments.

(Testimony of C. E. Lewis.)

2. You will allow the Indians to select their lands, heads of families selecting for themselves and their minor children.

3. Selections for orphans will be made by yourself and the Indian Agent.

4. Allotments should be made with reference to the best interests of the Indians, so that each may receive his proper proportion of irrigable land, the choice portions of the reservation to be utilized for completing the quantity to which they are entitled.

5. Every allotment should be distinctly marked with permanent monuments, and each allottee (of sufficient age) should be personally shown the boundaries of the allotment selected by him, and every possible means should be taken to familiarize them with the boundary lines. [365]

6. The several tracts of non-irrigable and grazing land given to each allottee should be contiguous to each other if possible, and as conveniently located as regards the irrigable part of the allotment as practicable, but an allottee may be allowed to select a detached tract if it be necessary in order to give him a proper proportion of timber, or water.

7. Each Indian should be allowed to select his land so as to retain improvements already made.

(Testimony of C. E. Lewis.)

Where the improvements of two or more Indians have been made on the same legal subdivision, a provisional line should be run dividing the land between them, as provided in Section 2 of the Act of February 8, 1887, unless an arrangement can be made between them, by which the tract can be given to one of them. Such arrangements, however, must be satisfactory to all the parties.

8. Indian women married to white men (not adopted) should be regarded as heads of families.

The white husbands unless legally adopted, with the sanction of the Department, are not entitled to allotments.

In all cases where Indian women have been married to Indian husbands and have children born of such marriage, but have been divorced from such husbands after the Indian custom, the mother should receive an allotment as the head of a family, and should be allowed to select land for her children, not under the charge of the father at the date of these instructions, if competent to do so.

9. Orphans are children who have lost both parents or who have no Indian parent living.

10. A person who has children or other persons legally or morally dependent upon him or her for care or support, and being in the same household, should be regarded as the head of a family.

(Testimony of C. E. Lewis.)

11. No person should be allowed an allotment on the Crow reservation, unless he is a recognized member of the Crow *trive,* or his father or mother is, or was, a duly recognized member thereof.

12. Children born of a marriage between a white man *an* Crow woman, solemnized after June 7, 1897, are not entitled to allotments, but children born of a marriage between a white man and a woman who is a member of the tribe by blood and not by adoption, solemnized before that date, are entitled to allotments.

"The reservation has been only partially surveyed. As soon as you are able to do so you will report what further surveys are necessary to the progress and completion of the work.

"You will prepare a schedule, in duplicate, of the allotments made, each family being grouped by itself, as far as practicable, and the relationship of each member to the head, shown in the column of remarks.

"The allotments should be numbered consecutively, and the omission of numbers and the use of half numbers avoided.

"The age (at the time the allotment is made) and the sex of the allottee should be given in the proper columns. [366]

"Where persons have both English and Indian names, each should be given, and care

(Testimony of C. E. Lewis.)

taken to have the names properly spelled and plainly written.

"The several tracts should be designated as irrigable, agricultural, or grazing, as the case may be.

"Your attention is called to the provisions of the act of February 8, 1887, with reference to religious societies or organizations.

"A supplemental schedule should be prepared, in duplicate, showing the lands reserved for religious or educational work among the Indians, and all lands used, occupied, or required for agency, school, or other public purposes.

"You will do such retracing of lines and establish and re-establish such monuments as may be found requisite, employing a surveyor, and the necessary assistants who should be Indians in all cases where practicable. You will also employ an interpreter when necessary.

"For such employes you will furnish proper vouchers and report them upon a 'List of Irregular Employes'."

"You will as soon as practicable submit an estimate of funds needed during the current quarter, and a similar one at the beginning of each subsequent quarter.

"The expenses are payable from the appropriation for allotments under the Act of 1887, reimbursable.

(Testimony of C. E. Lewis.)

"The work should be prosecuted with diligence and vigor, and as rapidly as a due regard to thoroughness and accuracy will permit.

"Plats and field notes and the necessary blanks will be sent you. Also the schedules of allotments heretofore made.

"A copy of these instructions will be forwarded to Agent Edwards, with directions to afford you every assistance in his power.

"In conclusion I would say that you have been selected for this work in view of its great importance and your record as a careful and pai staking official. It is believed you will spare no effort to allot these Indians to their satisfaction and in such manner as will give them every advantage which the reservation, with its costly system of irrigation, affords.

"You will report progress from time to time with such suggestions as you may deem proper to make.

Very respectfully,
(Signed) W. A. JONES
Commissioner.

J. F. A. (G)
Approved:
June 27, 1901.
Secretary." [367]

Plaintiff entered the same objection to defendants' Exhibit Seventeen as to their Exhibit Sixteen, and also entered the additional objection that these instructions were dated June 26, 1901 and

(Testimony of C. E. Lewis.)

were long subsequent in time to the instructions made to Hatchitt in 1890, under which the predecessor in interest of the defendants acquired his right.

Defendants' Exhibit Eighteen admitted.

(Defendants' Exhibit Eighteen has been certified to the Circuit Court of Appeals as a portion of this record. This exhibit contains copies of allotment sheets taken from the original Rankin and Roblin allotment records, kept in the office of the Commissioner of Indian Affairs, Washington, D. C. They contain land descriptions of the original allotments made by these agents of Indian predecessors in interest of the defendants, as well as other information pertaining to the allotment and the allottee. On certain sheets designated as the "Roblin Sheets" appears the classification of all lands of the defendants in this case, with the exception of lands of deceased Indian allottees, by Allotting Agent Roblin as either irrigable, agricultural or grazing. By stipulation between counsel these copies were to be considered by the Court as true and exact copies of the original allotment sheets.)

Plaintiff objected to this exhibit being received in evidence on the ground that it was incompetent, irrelevant and immaterial and having no bearing on the case under the issues as framed. The Court ordered the exhibit received in evidence, and an exception was taken to that ruling by the Plaintiff.

(Testimony of C. E. Lewis.)

DEFENDANTS' EXHIBIT NINETEEN
Admitted

"746957
81684-17 I. O.
1290

THE UNITED STATES OF AMERICA

To All Whom These Presents Shall Come
GREETING: [368]

"WHEREAS, an Order of the Secretary o the Interior has been deposited in the Genera Land Office, directing that a fee simple paten issue to the Claimant ARTHUR PETERS, Crow Indian, for the Lot three of Sectio eighteen and the north half of the northeas quarter and the southwest quarter of the north east quarter of Section seventeen in Township eight south of range thirty-four east of th Montana Meridian, Montana, containing on hundred fifty-six and ninety-four-hundredth acres:

"NOW KNOW YE, That the UNITE STATES OF AMERICA, in consideration o the premises HAS GIVEN AND GRANTED and by these presents DOES GIVE AN GRANT, unto the said claimant and to th heirs of the said claimant the land above de scribed; TO HAVE AND TO HOLD the same together with all the rights, privileges, immu nities and appurtenances, of whatsoever nature thereunto belonging, unto the said claimant an

(Testimony of C. E. Lewis.)

to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

"In TESTIMONY WHEREOF, I, WOODROW WILSON, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

"GIVEN under my hand, at the City of Washington, the EIGHTEENTH day of FEBRUARY in the year of our Lord one thousand nine hundred and EIGHTEEN and of the Independence of the United States the one hundred and FORTY SECOND.

By the President:

WOODROW WILSON

[Seal] By M. P. LeROY,

Secretary

L. Q. C. LAMAR,

Recorder of the General Land Office.

Recorded: Patent Number 617451.

Filed for record this 7th day of August 1918 at 9:00 o'clock A. M.

R. P. ROSS,

County Recorder

By HARRY G. ROGERS,

Instrument No. 11647 Deputy."

(Testimony of C. E. Lewis.)

DEFENDANTS' EXHIBIT TWENTY
Admitted

"THIS INDENTURE, Made the 10th day of April in the year of our Lord one thousand nine hundred and twenty-two, BETWEEN *BETWEEN* ARTHUR PETERS AND GRACE PETERS, his wife, the parties of the first part, and MARY DETHLEFSEN the party of the second part,

"WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Ten Dollars and other valuable considerations————DOLLARS, currency of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to her heirs and assigns, forever, the following described real estate, lying and being situate in the County of Big Horn, in the State of Montana, and more particularly described as follows, to-wit: [369]

"Lot Three (3), in Section Eighteen (18), Township Eight (8) South of Range Thirty-four (34) East of the Montana Meridian, Montana, containing 36.94 acres, more or less, according to the Government survey; together with all water and water-rights thereunto belonging or appertaining, or used in the irriga-

(Testimony of C. E. Lewis.)

tion thereof. (And this deed is given subject to one certain mortgage for $1500.00 given to E. E. Lonabaugh.)

"TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"TO HAVE AND TO HOLD, All and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to her heirs and assigns forever. And the said parties of the first part and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against the said parties of the first part and their heirs and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will Warrant and by these presents Defend.

"IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal] ARTHUR PETERS
[Seal] GRACE PETERS

"Witnesses:

GLADYS LOWELL
CLIFFORD BISHOP

Notarial Acknowledgments.

(Testimony of C. E. Lewis.)

DEFENDANTS' EXHIBIT TWENTY-ONE
Admitted

"H.
1095321
29450-23 I. O.
1293

THE UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

"WHEREAS, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant Alice Peters, an Indian of the Crow Reservation, for the southeast quarter of the southeast quarter of Section thirteen in Township eight south of Range *thrity*-three east and the west half of the northwest quarter of Section sixteen and the southeast quarter of the northeast quarter of Section seventeen in Township eight south of Range thirty-four east of the Montana Meridian, Montana, containing one hundred sixty acres:

"NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the land above described:

[370]

(Testimony of C. E. Lewis.)

"TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. The land covered by this Patent is not liable for any debt contracted prior to this date, as provided by Section 5 of the Act of February 8, 1887 (24 Stat., 388, 389), and the amendatory Acts of May 8, 1906 (34 Stat., 182) and June 21, 1906 (34 Stat., 325, 327).

"IN TESTIMONY WHEREOF, I, Warren G. Harding, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, in the District of Columbia the twenty-sixth day of July in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

By the President:
WARREN G. HARDING
By ADA BRADDOCK,
Assistant Secretary.

[Seal] M. P. LEROY,
Recorder of the General
Land Office.

(Testimony of C. E. Lewis.)

Recorded: Patent Number 913103.

Filed for record this 13th day of November, A. D. 1928 at 9:40 o'clock A. M.

Instrument No. 45450.

CARL RANKIN
County Recorder.
By RAY C. THOMPSON
Deputy Recorder."

DEFENDANTS' EXHIBIT TWENTY-TWO
Admitted

(Defendants' Exhibit Twenty-two is a Warranty Deed, dated October 26th, 1928, from Alice Peters Redfield, formerly Alice Peters, and W. P. Redfield, her husband, to Nickels Dethlefsen, to the southeast quarter of the southeast quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section Thirteen (13), in Township Eight (8) South of Range Thirty-three (33) East, and the west half of the northwest quarter ($W\frac{1}{2}NW\frac{1}{4}$) of Section Sixteen (16), and the Southeast quarter of the northeast quarter ($SE\frac{1}{4}$-$NE\frac{1}{4}$) of Section Seventeen (17), in Township eight (8) south of Range thirty-four (34) east of the Montana Meridian, Montana, containing 160 acres, according to Government survey. This deed is identical in terms with Defendants' Exhibit Twenty.) [371]

DEFENDANTS' EXHIBIT TWENTY-THREE
Admitted

(Defendants' Exhibit Twenty-three is a fee patent dated October 28th, 1919, to Rosa Peters,

(Testimony of C. E. Lewis.)

predecessor in interest to the defendants' Dethlefsens, to the south half of the southeast quarter and the southeast quarter of the southwest quarter of Section seven, and the northwest quarter and the northeast quarter of the southwest quarter of Section seventeen in Township eight south of Range thirty-four east of the Montana Meridian, Montana, containing three hundred twenty acres. This fee patent is identical in terms with the defendants' Exhibit Nineteen.)

DEFENDANTS' EXHIBIT TWENTY-FOUR Admitted

(Defendants' Exhibit Twenty-four is a Warranty Deed, date March 21st, 1922, from Rosa Peters and Oliver E. Peters, her husband, to Nickels Dethlefsen, for the South Half of the Southeast Quarter (S½SE¼) and the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of Section Seven (7), and the Northwest Quarter (NW¼) and the Northeast Quarter of the Southwest Quarter (NE¼-SW¼) of Section Seventeen (17) in Township Eight (8) South of Range Thirty-four (34) East of the Montana Meridian, Montana, containing 320 acres, according to Government survey; together with all water and water rights thereunto belonging, including water-right filed by Oliver Peters and appropriated on the 1st day of June, 1896, for the S½SE¼ and SE¼SW¼ Section 7, Township 8 South Range 34 East, M.P.M. above described.

(Testimony of C. E. Lewis.)

This deed is identical in terms with Defendants' Exhibit Twenty.)

Defendants' Exhibit Twenty-five admitted.

(Defendants' Exhibit Twenty-five is a fee patent dated February 4th, 1920, to George Peters, predecessor in interest of the defendants' Dethlefsens, for Lot Four, the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section Eighteen in Township Eight [372] south of Range Thirty-four east of the Montana Meridian, Montana, containing one hundred fifty-six and ninety-eight hundredths acres. This fee patent is identical in terms with defendants' Exhibit Nineteen.)

Defendants' Exhibit Twenty-six admitted.

(Defendants' Exhibit Twenty-six is a warranty deed dated April 11th, 1922, from George Peters and Martha Peters, his wife, to Mary Dethlefsen, for Lot Four (4), the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section Eighteen (18) in Township Eight (8) South of Range Thirty-four (34) East of the Montana Meridian, Montana, containing 156.98 acres, according to the Government survey; together with all water and water-rights thereunto belonging or appertaining, or used in the irrigation thereof. This deed is identical in terms with Defendants' Exhibit Twenty.)

(Testimony of C. E. Lewis.)

DEFENDANTS' EXHIBIT TWENTY-SEVEN Admitted

"Irrigation
44554-32

United States
Department of the Interior
Office of Indian Affairs
Washington

Feb. -9 1935.

"AIR MAIL
W. M. Johnston, Esq.,
Electric Building,
Billings, Montana.

My dear Mr. Johnston:

"Reference is had to your letter of January 28, addressed to Senator Wheeler and letter from this Office dated February 8, in reply thereto relative to your securing certified copies of the "Hatchitt Allotment Schedule" showing the selections of certain Indians on the Crow Reservation, Montana.

"This office has just received a telegram from the local United States Attorney advising that he has no objection to furnishing the information requested. In view of this, there has been prepared a photostat copy of that portion of [373] the schedule showing the selection of Rosa Peters nee Martinez. It is to be understood that this particular schedule was never

(Testimony of C. E. Lewis.)

approved by the Department as explained in our letter to you of February 8. The certified copy is enclosed herewith * * *.

Sincerely yours,

(Signed) JOHN COLLIER

Enclosure 419120 Commissioner."

Only that portion of photostat copy with reference to the allotment of Rosa Martinez appears below.

"No. of Allotment—1450; 1304.
Name of Indian—None.
Allottee English—Rosa Martinez.
Male.
Female—F.
Age—18.
"Subdivision—S½-SE; S½-SW.
S ction—7; 8.
Town.—85; 85.
Range—34E; 34E.
Acres—80; 80.
100ths.
Remarks—Daughter; Grazing Land."

CARL RANKIN,

was called as a witness for the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

(Testimony of Carl Rankin.)

I live at Hardin, Montana. My father was John K. Rankin who was referred to in this case as one of the allotting agents on the Crow Indian Reservation. I assisted my father in the work of making these allotments. I was 22 years old at that time.

The defendants, through Messrs. Johnston and Burke offered to prove by the witness, Carl Rankin, that his father, John K. Rankin, the alloting agent in question, in making the allotments of irrigable land on the Crow Reservation from the year 1901 to 1906 allotted approximately 80 acres of irrigable land to [374] each head of a family and 40 other acres of irrigable land to each other Indian on the reservation; that in all of the allotments made by John K. Rankin, that at least 40 acres were irrigable land and so designated in making the allotments, and that in some cases there were 80 acres, according to whether they were heads of families or not. To which offers of proof plaintiff objected on the grounds that it was immaterial, incompetent and hearsay; that the allotting agent and his policy has no bearing on the case, he having only such authority to bind the Government as is granted by express statute or by necessary implication from express statutes or the instructions given to him in writing by the one having charge of such matters, the Secretary of the Interior or the Commissioner of Indian Affairs, and other competent authorities of the United States Government; that the instructions to the allotting agents are among the exhibits; that

(Testimony of Carl Rankin.)

the quantity of lands allotted and the designation of these lands, if any, was a matter of record and the testimony of Mr. Rankin not being the best evidence; that the amount of allotted lands by Allotting Agent Rankin appears on the record and it is now in evidence.

Mr. BURKE: In addition to the offer of proof made by Mr. Johnston, we offer to prove by the witness Carl Rankin that of all of the allotments made by John K. Rankin that at least forty acres was irrigable land and so designated in making the allotments and that in some cases there was eighty acres, according to whether they were heads of families, or not.

The Court thereupon denied these offers of proof and sustained plaintiff's objection.

B. C. LILLIS,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

I live at Billings, Montana, and am a civil engineer specializing in irrigation. I have been such for about 30 years. I am a graduate of the Case School of Applied Science at Cleveland, Ohio.

I was employed in the Coast and Geodetic Survey from 1903 to 1904, and in the United States Reclamation Service [375] from 1904 to 1906 in Montana.

(Testimony of B. C. Lillis.)

I spent one season in this work in the Big Horn valley on the Crow Indian Reservation. I have had constant connection during the past thirty years with different irrigation projects in this part of the State. I have had experience with the measurement of water necessary to irrigate land and have owned and operated an irrigated farm in Yellowstone County for about twenty-four years. I have done actual irrigating. I am familiar with all classes of soil which we have in this part of the State, running from sandy loam to heavy gumbo. I am also familiar with the different classes of soil in the irrigated valley of the Little Horn River and Lodgegrass Creek. The character of the soil in the Little Horn and Lodgegrass valleys would be classed as a clay loam to a sandy loam generally. From my experience as a farmer and as an irrigation engineer, I would state that the amount of water required per acre for the successful irrigation of those soils, the water to be measured when delivered at the land, would be a half inch to the acre. That would be ample.

NICKELS DETHLEFSEN,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

I am one of the defendants in this action. I have an irrigation ditch that taps Lodgegrass Creek. I

(Testimony of Nickels Dethlefsen.)

have farmed this land that my wife and I have owned in the Lodgegrass valley, thirteen years. I have used the same irrigation ditch all of that time.

The character of the soil through which this ditch is constructed is partly sandy and partly gumbo. This sandy soil is sandy loam. The ditch is about a mile and a half from its point of diversion, that is, where it taps the river to where it reaches the Rosa Peters place. Half of the ditch is through [376] sandy loam and half through gumbo soil.

Cross-Examination
of NICKELS DETHLEFSEN

By Mr. BALDWIN:

I cannot state with any degree of certainty how much is gumbo and how much is sandy loam.

B. C. LILLIS,

was recalled as a witness in behalf of the defendants, and having been previously sworn, upon direct examination by Mr. Johnston, testified as follows:

The amount of loss from seepage and evaporation in carrying a head of water of 30 miner's inches from the intake to the end of the ditch described by Mr. Dethlefsen, would be at the rate of about 1% per mile, and through the sandy soil, about 2% per mile.

R. H. FIFIELD,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

I am a civil engineer, specializing in irrigation work. I am a graduate of the University of Maine, and have practiced my profession with reference to irrigation for thirty years. I have had experience in connection with my work as to the quantity of water required for the proper irrigation of different soils in this part of Montana.

I was project engineer of the Huntley Project for eight years. I was superintendent of the Billings Bench Water Association for two years. I have been engineer for this Association for the past thirteen years. The character of soil in these different projects varied from light sandy soil to heavy gumbo, [377] heavy clay loam. I have heard the testimony here as to the soils on the Crow Indian Reservation. They vary from a sandy loam to a clay loam, or gumbo.

From my experience as an irrigation engineer, the water required to irrigate that character of soil in the Lodgegrass and Little Big Horn River valleys would depend somewhat on the character of crops grown. If the crops are beets and beans you would probably use three-quarters of an acre foot per acre every thirty days. For grain about half an acre foot in thirty days. It would be about half a miner's inch per acre for beets and beans, and one-third of a miner's inch for grains.

(Testimony of R. H. Fifield.)

Where the crops are diversified, some beets and hay, alfalfa hay and wheat, barley and oats, the amount of water required would be half a miner's inch per acre for 120 days during a dry season, like 1934, and in a wet season half a miner's inch per acre for 60 days.

Cross-Examination
of R. H. FIFIELD

By Mr. BALDWIN:

I do not know the nature of the soil under any of the Government ditches. I can only testify in a general way what is adaptable to this country.

OLIVER PETERS,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

I have lived on the Crow Indian Reservation since 1893. My wife's maiden name was Rose Martinez. She is a member of the Crow Tribe of Indians. Alice, George and Arthur Peters are our children. Mrs. Peters and I made our home on her allotment in 1893. [378]

The map designated as Defendant's Exhibit One correctly portrays the line of the ditch which I built. I made that irrigation ditch, marked on the map as the "Old Peter's Ditch," in 1896. I paid for

(Testimony of Oliver Peters.)

all the work myself. The ditch was completed in 1896. About five years later I put in a headgate. The lumber for that headgate was furnished by the irrigating outfit at Crow Agency. I did not pay for the headgate.

The size of the ditch was 40 inches by 30 inches. Its depth was 3 feet. I irrigated land from this ditch on Mrs. Peters' allotment in Section 7. I first irrigated in 1896. I continued to irrigate this land in Section 7 for 40 years. I sold this land to Mrs. Dethlefsen in 1922. This Indian 40 acres was under irrigation and cultivation three years after I took the ditch out. Through the same ditch I also irrigated lands allotted to my children, Alice, Arthur and George. I started irrigating these lands about five or six years after I completed the ditch.

Defendants' Exhibit One correctly represents the boundaries or description of the lands that I irrigated in those three 40 acre tracts designated as "Alice Peters", "Arthur Peters" and "George Peters" on said map. There were 30 acres under cultivation and irrigation in Alice's tract, 30 acres in George's tract, and 25 acres in Arthur's tract. Before these lands were sold to the Dethlefsen's, these forties were irrigated continuously every summer.

Cross-Examination
of OLIVER PETERS

By Mr. SIMMONS:

Mr. Rankin did not allot any additional lands to Rosa Martinez. Later there were more added to

(Testimony of Oliver Peters.)

it, but none were taken away and none ca
celled. [379]

ROBERT SMITH,

was called as a witness in behalf of the defendants and having been first duly sworn, upon direct ex amination by Mr. Johnston, testified as follows:

I have lived on the Crow Reservation for the pas 37 years. I am acquainted with the lands occupie by the Dethlefsens, and have seen the irrigation ditch that leads from Lodgegrass Creek to thes lands. I f st saw it in 1899. There were some culti vated lands on the Peters' allotment that year.

From 1907 to 1919 I lived right on the bank o this ditch. During those years I saw alfalfa, wheat and oats grown on these lands. During these years that I knew the Peters' places, they conveyed water through this ditch to properly irrigate the crops that were growing there. There were approximately 25 acres under cultivation in the Peters' place. On their childrens' place, about 40 acres or better.

Defendants' Exhibit One represents approxi mately the lands irrigated by Peters and his children during those years. Since Mr. and Mrs. Dethlefsen moved to the Peters place they have irrigated and farmed those allotments through the Peters Ditch designated as such on Defendants' Exhibit One. The crops raised by the Dethlefsens on these various

(Testimony of Robert Smith.)

tracts were principally alfalfa. The Government furnished the lumber for the headgate.

Cross-Examination
of ROBERT SMITH

By Mr. ALLAN:

I know that the lumber furnished for the headgate was cut at Crow Agency and set up there. It was furnished to Rose Peters, who was an Indian ward of the Government.

NICKELS DETHLEFSEN,

was recalled as a witness in behalf of the defendants, and having been previously sworn, upon direct examination by Mr. Johnston, [380] testified as follows:

Mrs. Dethlefsen and I moved on this land on May 2, 1922, the year that we purchased it. We also purchased during that year the allotments of Alice, George and Arthur Peters. On the Rosa Peters land there were 35 acres which had been irrigated and cultivated before I bought it; on the Alice, George and Arthur Peters allotments, about 50 acres. I increased the irrigable acreage on the Rosa Peters allotment since I purchased it, about 7 or 8 acres; the George Peters, about 6 or 7 acres.

The ditch running from Lodgegrass Creek to these lands when I bought them was about a mile

(Testimony of Nickels Dethlefsen.)

and a half long. Defendants' Exhibit One repres
a correct description of the way Lodgegrass C
runs through these lands. Also the "Old Pe
Ditch" and the "Old Irrigation Ditch", and of
irrigation ditch as it is now. I changed the p
of diversion to about 40 yards down the creek.
designations on this exhibit of the acreage un
irrigation when I bought it and the acreage un
irrigation and cultivation now, is correct.

I have raised principally alfalfa, clover and t
othy on these lands; some oats and barley.

In June, 1934 Mr. Chandler, the ditch rider, as
me to close down my gates. I closed them down u
about the middle of August.

Cross-Examination
of NICKELS DETHLEFSEN

By Mr. Simmons:

There were 320 acres in the Rosa Peters t
which I purchased. I paid about $15.00 an acre
that land. There was only a part of the fence
this land, and no other improvements. I p
$12.50 an acre for the 40 acres in the Arthur Pe
tract. For the 160 acres in the Alice Peters tra
paid [381] about $6.00 an acre. For the 160 in
George Peters tract I paid about $6.00 or $7.00
acre. On the George Peters tract there was a g
ary and a fence, of very little value.

MATT H. TSCHIRGI,

was called as a witness for the defendants, and having been first duly sworn, upon direct examination by Mr. Burke, testified as follows:

My wife, Bertha Tschirgi, and I are defendants in this action. Neither Bertha Tschirgi nor I have personally diverted or used any of the waters of the Little Big Horn River.

DEFENDANTS' EXHIBIT TWENTY-EIGHT
Admitted

Defendants' Exhibit Twenty-eight contains certified copies of the following instruments recorded in the Office of the County Clerk and Recorder of Big Horn County, Montana:

Patent from United States to Frank M. Heinrich, Document No. 73, Filed Feb. 8, 1913 at 4:06 P.M., dated Nov. 14, 1910.

Patent from United States to F. M. Heinrich, Document No. 53, Filed Feb. 8, 1913 at 3:06 P.M., dated Oct. 11, 1909.

Patent from United States to Frank M. Heinrich, Document No. 77, Filed February 8, 1913, at 4:18 o'clock P. M., dated March 23, 1911.

Patent from United States to Frank M. Heinrich, Document 1230, Filed Jan. 8, 1914, at 9:25 o'clock A.M. Dated July 16, 1913.

Patent from United States to Frank M. Heinrich, Document No. 50, Filed Feb. 8, 1913 at 2:57 P.M. Dated April 23, 1909.

(Testimony of Matt Tschirgi.)

Patent from United States to Frank M. Heinrich, Document No. 49, Filed February 8, 1913 at 2:54 P.M. Dated April 23, 1909.

Patent from United States to Frank M. Heinrich, Document No. 41. Filed Feb. 8, 1913 at 2:30 P. M. Dated April 23, 1909.

Patent from United States to N. C. Bacheller, Document No. 3222, Filed May 12, 1915 at 1:00 P.M. Dated July 1, 1910.

Patent from United States to Charles Yarlott, Frank Yarlott and Katie Yarlott, Devisees of Mrs. David Yarlot, heir of Gives Away and The Other Gun, Document No. 47587. Filed May 24, 1929 at 4:40 P.M. Dated March 26, 1929.

Patent from United States to David Stewart and Katie, or Katie Yarlott Stewart, heirs of Frank Stewart and Joseph Garrett Stewart, Document No. 40215. Filed Aug. 2, 1927 at 9:15 A.M. Dated June 14, 1927.

Patent from United States to Bertha Tschirgi. Document No. 46467, Filed Feb. 9, 1929 at 10:20 A.M. Dated Feb. 14, 1928. [382]

Patent from United States to Bertha Tschirgi. Document No. 46466. Filed Feb. 9, 1929 at 10:15 A.M. Dated Feb. 14, 1928.

(Testimony of Matt Tschirgi.)

Deed from H. C. Bacheller and Cleoria Bacheller, to Hulda Miller, Document No. 3223. Filed May 12, 1915 at 1:05 P.M. Dated Jan. 16, 1914.

Deed from Hulda Miller to Fred Miller, Document No. 3264. Filed May 20, 1915 at 11 A.M. Dated May 17, 1915.

Deed from M. H. Tschirgi, to Antler Land Company, Document No. 42931. Filed Mar. 30, 1928 at 11:10 A. M. Dated February 29, 1928.

Deed from F. M. Heinrich to Matthew M. Tschirgi, Document No. 2805, Filed Feb. 18, 1915 at 9:00 A.M. Dated Dec. 1, 1914.

Deed from Fred E. Miller and Emma S. Miller, to Matthew H. Tschirgi, Document No. 4402, Filed Jan. 12, 1916 at 9:05 A.M., dated Sept. 16, 1915.

Deed from Charles Yarlott et al to Antler Land Company, Document No. 48012. Filed June 21, 1929 at 1:45 P.M. Dated Apr. 9, 1929.

Deed from Bertha Tschirgi et con to Antler Land Company, Document No. 46534, Filed Feb. 19, 1929 at 9:50 A.M., Dated Jan. 30, 1929.

Deed from David Stewart et ux to Matthew H. Tschirgi, Document No. 40216, Filed Aug. 2, 1927 at 9:20 A.M. Dated July 27, 1927.

(Testimony of Matt Tschirgi.)

All of the patents are identical in terms with Defendants' Exhibit Nineteen, and all of the deeds are identical in terms with Defendants' Exhibit Twenty, with the exception of two deeds which are Quit Claim Deeds, and the patents to David Stewart and Katie Yarlott Stewart and Bertha Tschirgi which contain, in addition to the provisions identical with Defendants' Exhibit Nineteen, a reservation to the United States for the benefit of the Crow Tribe in accordance with the provisions of the Act of Congress of June 4, 1920 (41 Stat. 751), of the coal, oil, gas or other mineral deposits in the lands above described.

I am at the present time manager of the Antler Land Company, the business of which company is raising hay, grain and sugar beets. I have lived on the Little Big Horn River and its tributaries for 49 years. I have been engaged constantly in stock raising and farming.

I have personally irrigated for two seasons [383] on Pass Creek, a tributary to the Little Horn River, and have supervised irrigation for approximately 300 acres of land under the Government ditch on my own ranch during the last seven or eight years. I have also supervised the irrigation of approximately 1500 acres under the Farmers Alliance Ditch.

I am one of the executors of the Frank Heinrich Estate which has 2600 acres of irrigated land on the Big Horn River under the Government ditch.

(Testimony of Matt Tschirgi.)

Part of the Antler Land Company's lands are located under the Upper Little Horn Ditch No. 2, and part under the Farmers Alliance Ditch on the west side of the Little Big Horn River. I divert waters for the irrigation of the lands described in the bill of complaint, through the Farmers Alliance Ditch, which is sometimes called the Tschirgi ditch. I divert waters through this ditch for the Antler Land Company, sufficient for the irrigation of about 1500 acres. This water is not only used upon lands owned by the Antler Land Company, but also upon lands leased from other white owners and Indians.

Defendants' Exhibit Twenty-nine admitted.

(Defendants' Exhibit Twenty-Nine is a true and correct tracing of a portion of Plaintiff's Exhibit Two. The legend was placed on the map by an engineer, a witness of the defendants. This map has been certified to the Circuit Court of Appeals as a part of the record in this case.)

I irrigate 537 acres of land owned by the Antler Land Company from the Little Big Horn River through the Farmers Alliance Ditch. The lands owned by the Antler Land Company are in blue and purple colors on Defendants' Exhibit Twenty-nine. The lands designated on this exhibit in white, are lands owned by the Antler Land Company which are not irrigated. These lands [384] designated in blue irrigated by the Antler Land Company, are under the Rankin allotments. The lands marked in

(Testimony of Matt Tschirgi.)

purple are under the Roblin allotment. Diversions of water are made to the lands in purple. I used water on the LaDow land marked dark brown on Defendants' Exhibit Twenty-Nine.

DEFENDANTS' EXHIBIT THIRTY
Admitted

(Defendants' Exhibit Thirty contains certified copies of records showing the deraignment of title to the lands described in paragraph eighteen of the bill of complaint. Defendants' Exhibit Thirty contains the following:

Indian Deed Inherited Lands from Richard Cummins to Mattie Williams Small, Document No. 4467, filed Jan. 8, 1916 at 9:30 A.M. Dated Sept. 7, 1915.

Sheriff's Deed from R. P. Gilmore, Sheriff to The Yellowstone-Merchants National Bank of Billings, Montana, Document No. 34470, Filed Nov. 7, 1925 at 10:05 A.M. Dated October 26, 1925.

Indian Deed Inherited Lands from Richard Cummins, One Blue Bead, and Bad Heart, heirs of Buffalo That Sings, Crow allottee No. 1702, to Mattie Williams Small. Document No. 4468; Filed Jan. 8, 1916 at 9:35 A.M. Dated Sept. 7, 1915, and recorded in "4" of Deeds, Page 639-640.

U. S. Patent from the United States of America to Mattie Williams Small, Document No. 4126. Filed Nov. 17, 1915 at 3:02 P.M. Dated July 18, 1912;

(Testimony of Matt Tschirgi.)

Deed from The Yellowstone-Merchants National Bank of Billings to Northland Securities Company, Document No. 40667, Filed Sept. 17, 1927 at 10:30 A.M. Dated Aug. 25, 1927.

Deed from Northland Securities Company to Mary I. LaDow of Fredonia, Kansas. Document No. 41014, Filed Oct. 18, 1927 at 2:15 o'clock P.M. Dated June 13, 1927, and recorded in "17" of Deeds, Page 54.

The two patents are identical in terms with Defendants' Exhibit Nineteen. The Sheriff's Deed is in the usual form. The Indian deeds of inherited lands are identical with the terms of Defendants' Exhibit Twenty. The deed from the Northland Securities Company is identical with the terms of Defendants' [385] Exhibit Twenty. The deed from the Yellowstone-Merchants National Bank is a Quit Claim Deed and not a Warranty Deed, identical with that exception to Defendants' Exhibit Twenty.)

There are 150 acres of the LaDow land upon which this water is diverted. The white owned land upon which we use this water is designated on Defendants' Exhibit Twenty-nine in yellow. We use water on about 450 acres of this land. Part of the Indian owned allotments which received water out of the Farmers Alliance Ditch, is in red on this exhibit and part is in the original coloring on the map. We placed water on approximately 400 acres of Indian owned land. These lands were under lease with the Antler Land Company.

(Testimony of Matt Tschirgi.)

Water is also taken out of the Farmers Alliance Ditch and used upon the lands of the Schroeder boys, and upon the lands belonging to the Mattie Small estate, and upon lands farmed by Carson Yellowstail.

(Witness at the request of counsel marked "x" on this exhibit, which designated the approximate location of the Small and Schroeder lands which use water out of the Farmers Alliance Ditch.)

The plaintiff objected to the introduction in evidence of Defendants' Exhibit Twenty-Nine for the reason that it was incompetent, irrelevant and immaterial; that the markings in different colorings were shown to be incorrect and not shown as even made by one qualified to make them; that large portions of the map offered in evidence under the exhibit have not been accounted for, pointed out or designated, and it would tend to confuse rather than inform the Court in the case. The Court received the exhibit in evidence for only what it illustrated.

The upper portions of the land as [386] indicated on the map have been irrigated since 1917. The portion further north has been irrigated since 1919 continuously each year.

The Farmers Alliance Ditch was constructed in 1916 and completed in 1919. It was originally constructed by Mr. Schroeder, his children, Mrs. Mattie Small and myself. The ditch was then enlarged and continued by Mr. S. G. Reynolds, Mr. Gilbert and myself.

(Testimony of Matt Tschirgi.)

DEFENDANTS' EXHIBIT THIRTY-ONE
Admitted

"NOTICE OF APPROPRIATION.

"State of Montana
County of Big Horn—ss.

TO ALL WHOM THESE PRESENTS MAY CONCERN:

BE IT KNOWN, That Matthew H. Tschirgi of Wyola, in said County and State, *do* hereby publish and declare as a legal notice to all the world, as follows, to-wit:

I. That he did on August 31st, 1915, appropriate and now has a legal right to the use, possession and control of and claims four hundred miner's inches (being ten cubic feet per second of time) of the waters of the Little Big Horn River and its tributaries in said County and State, for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for domestic purposes and for irrigation of land in Sections 9, 10, 14 and 15 Township 9 South Range 34 East Montana Meridian.

III. That the means of diversion by which he intends to divert the said water is as follows: A headgate (no dam) bearing S 5° 25′ W 3024 ft. from the N¼ corner of Sec. 17 T9S R34E M M for ditch to have 5 ft. bottom 8 ft. top 1½ to 1 inner slope of bank 1 ft. deep S (grade)-

(Testimony of Matt Tschirgi.)

.001, which carries and conducts six hundred sixty inches of water. Diversion point is from beaver dam back water on N side of Little Horn River. Said ditch to be an extension and enlargement on the Small-Schroeder ditch for which appropriation was made June 2, 1914, filed June 11, 1914. Said ditch runs in a northeasterly direction thence over and upon said land.

IV. That he appropriated and took said water on the 31st day of August, 1915, by means of said initial work of canal construction.

V. That the name of the appropriator of said water is Matthew H. Tschirgi legal owner of the land for which water is appropriated.

VI. That he also hereby claims said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed [387] from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any flumes, dams, reservoirs, constructed or to be constructed by himself in appropriating and using said water.

VII. That he also claims the right to keep in repair and enlarge said means of water appropriation at any time, and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

CLAIMING THE SAME ALL AND SINGULAR, Under any and all laws National and State, and according to the rulings and deci-

(Testimony of Matt Tschirgi.)

sions thereunder, in the matter of water rights.

TOGETHER WITH ALL AND SINGULAR, The hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

WITNESS my hand at Wyola, Montana, this 29th day of December, 1915.

(Signed) MATTHEW H. TSCHIRGI"

(Acknowledgment follows.)

Defendants' Exhibit Thirty-two admitted.

(Defendants' Exhibit Thirty-two is another notice of appropriation covering the Farmers Alliance Ditch, dated August 15, 1916. It is identical in form with Defendants' Exhibit Thirty-one, except that it is a filing for the extension of the ditch to take in more land.)

After the first ditch was constructed, it was two years before the enlargement was made.

The plaintiff objected to the introduction in evidence of Defendants' Exhibits Thirty-one, Thirty-two and Thirty-three UPON THE GROUNDS THAT they were incompetent, irrelevant and immaterial, and an endeavor on the part of an individual to go on tribal lands within the exterior boundaries of an Indian Reservation and to locate water which was definitely assigned to the Indians for their use on the Reservation by the Treaty of May 7, 1868. The Court received these exhibits in evidence under the objections of plaintiff. [388]

(Testimony of Matt Tschirgi.)

After I purchased these lands in 1914 I immediately proceeded to place them under irrigation.

DEFENDANTS' EXHIBIT THIRTY-THREE
Admitted

(Defendants' Exhibit Thirty-three is a further Notice of Appropriation signed by S. G. Reynolds, United States Indian Agent, dated November 8, 1905.

Clerk's File 286.

LOCATION OF WATER RIGHT—NOTICE OF APPROPRIATION.

State of Montana
County of Rosebud—ss.

To all whom these presents may concern, be it known that I, S. G. Reynolds, United States Indian Agent for and in behalf of the Indians of the Crow Indian Reservation in Montana, of Crow Agency in said county and state, do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That said Indians have legal right to the use, possession and control of and claim 6,000 inches or 156.25 cubic ft. per second inches of the waters of the Little Big Horn River in said county and state, for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for

(Testimony of Matt Tschirgi.)

the irrigation of allotted lands on the Crow Indian Reservation in Montana, in Sec. 17, 16, 15, 9, 10, 11, 12, 2, 1T. 9S., R. 34E.; Sec. 5, 6T. 9S., R. 35E; Sec. 36 T. 8S., R. 34E.; Sec. 31, 32, 29, 30, 28, 20, 21, 22, 14, 15, 10, 11, 2, 3, T. 8S., R. 35E. of the principal meridian of the State of Montana.

III. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which he intend... to divert the said water is as follows: A canal 48 inches by twelve (12) feet six (6) inches in size, which will carry and conducts 6,000 inches of water from said Little Horn River; which said canal diverts the water from said stream at a point upon its left bank, and runs thence northeasterly through Sec. 17, 9, 10, 3, 2. 1, T. 9S., R. 34E.; Sec. 36, T. 8S., R. 34E; Sec. 33, 30, 29, 20, 21, 16, 15, 10, 3, 2T. 8S., R. 35E. of the principal meridian of the State of Montana, thence over and upon said land (or mining claim).

IV. That said Indians appropriated and took said water on the first day of October, A. D. 1905 by means of said canal survey.

V. That the name of the appropriator of said water is S. G. Reynolds, Indian Agent for and in behalf of the Indians of the Crow Reservation, Montana.

VI. That said Indians also hereby claim said ditch and the right of way therefor, and

(Testimony of Matt Tschirgi.)

for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed or to be constructed by them in appropriating and in using said water.

VII. That said Indians also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same, all and singular, under any and all laws, national and state, and in accordance with the rulings and decisions thereunder, in the matter of water rights.

Together with all and singular the hereditaments, and appurtenances thereunto belonging and appertaining, or to accrue to the same.

Witness my hand at Crow Agency, Montana, this eighth day of November, 1905.

S. G. REYNOLDS,
United States Indian Agent.

State of Montana
County of Rosebud—ss.

S. G. Reynolds, U. S. Ind. Agt. having first been duly sworn, depose and say that he is of lawful age and is the appropriator and claimant of the water and the water right mentioned

(Testimony of Matt Tschirgi.)

in the foregoing notice of appropriation and claim, and the person whose name is subscribed thereto as the appropriator and claimant, that he know_ the contents of said foregoing notice and that the matters and things therein state are true.

S. G. REYNOLDS,
U. S. Indian Agent.

Subscribed and sworn to before me, this eighth day of November, A. D. 1905.

[Seal] FRED E. MILLER
U. S. Commissioner
.....County, Montana.

Filed Nov. 16, 1905: 9 A. M. Fee $2.00.
R. J. COLE,
Clerk and Recorder.

Transcribed from permanent records Rosebud County Water Rights Book #1 Page 452. (Above recorded in "A" Miscellaneous Water Right Record, Page 430.)

Defendants' Exhibit Thirty-four admitted.

(Defendants' Exhibit Thirty-four is a certified photostatic copy of a map of proposed Upper Little Horn Ditch No. 1, which was never constructed by the Government. This exhibit is certified to the Circuit Court of Appeals as a part of the records in this case.)

(Testimony of Matt Tschirgi.)

To the introduction in evidence of this exhibit plaintiff objected on the grounds that it was incompetent, irrelevant and immaterial, and was not shown to be a Government record intended for use, it appearing from the exhibit itself that it was merely a tentative survey made by some Government agent in an effort to determine where there might be a ditch taking water from the Little Big Horn for the use of Indians upon Indian lands at a point that would result in the greatest benefit to the greatest number; and that it is not the law that any private individual has a right to adopt the survey made by the Government and construct a ditch upon it, and as a result thereof acquire a right to the use of any water. The Court admitted the exhibit and allowed the plaintiff an exception to this ruling, and a further exception to testimony along these lines which was admitted in evidence.

From the years 1909 on, I was over the lands under the proposed Upper Little Horn Ditch No. 1 six or seven times [389] a year. I saw stakes along the line of the ditch which had been placed there by a surveying party. These stakes were on lands in Sections 9 and 10 of 9-34, and in 2 of 9-34. I followed the general line of the stakes in 1910 and 1911. These stakes were placed in just about the same general line of the present ditch.

(Testimony of Matt Tschirgi.)

DEFENDANTS' EXHIBIT THIRTY-FIVE

Admitted

"Department of the Interior
Office of Indian Affairs
Washington.

"Land April 6, 1905.

"Samuel G. Reynolds, Esq.,
U. S. Indian Agent,
Crow Agency, Montana.

Sir:

In an informal conference with Chief Engineer W. H. Code he states that no filings have been made on behalf of the Crow Indians for water for irrigation purposes. This Office is not informed as to the correctness of this impression of Chief Engineer Code.

Upon receipt of this letter you will please investigate the matter and if proper filings have not been made you will immediately take steps to file on the maximum quantity of water that can be carried by the canals now constructed in the Crow Reservation. On the other hand if the necessary filings have been made, please advise as to the date and also when the matter was brought to the attention of this Office.

Very respectfully.

C. F. FARRABEE

(M. G.) P. Acting Commissioner."

(Testimony of Matt Tschirgi.)

In addition to the objections of plaintiff to Exhibit Thirty-four being received in evidence, the following and further objection was entered by plaintiff: That there was no showing that the witness on the stand, nor the predecessors of the Antler Land Company, were the persons acting on behalf of the Crow Indians, and that the United States, or the Crow Indians could not lose any right that they had to the use of the water by the attempted appropriation by the agent of the United States, of the waters, under the state laws of Montana. [390]

The further objection, along with the original objection of the plaintiff was over-ruled and an exception noted.

Q. (By Mr. Burke) Were you present at any conversation wherein S. G. Reynolds, the Crow Indian Agent at Crow Agency, and Mr. Heinrich, had any understanding with reference to construction of the proposed Little Horn Ditch Number One?

Mr. BALDWIN: We object to that as incompetent, irrelevant and immaterial, his being present at talks by others. None of them could represent the Government in this matter, or bind it.

The COURT: Well, I will sustain the objection as to that. That is going a little too far, I think. I do not think that is an exception to the hearsay rule.

Mr. BURKE: May I make an offer of proof, Your Honor?

(Testimony of Matt Tschirgi.)

The COURT: All right, make your offer.

Mr. BURKE: The defendant Antler Land Company offers to prove by the witness M. H. Tschirgi, that in the year 1910 he was present at a conversation held between Mr. Frank M. Heinrich, who was the predecessor in interest of Antler Land Company, and S. G. Reynolds, who was the Indian Agent in charge of the Crow Indian Reservation, at which conversation Mr. Reynolds, as Agent, told Frank M. Heinrich that the United States Government had surveyed and proposed to construct a ditch known as Upper Little Horn Number One, which is on practically the same lines as the Farmers Alliance Ditch, and would cover the lands of Antler Land Company under such ditch; and that Mr. Reynolds informed Mr. Heinrich at that time that Mr. Heinrich need not spend the money to build his ditch, which Mr. Heinrich had told Mr. Reynolds in my presence that he intended to construct, and Mr. Reynolds further told Mr. Heinrich that the United States Government would not permit [391] anyone, including Mr. Heinrich, to build a ditch to irrigate the lands which Mr. Heinrich owned under the proposed survey, for the reason that the Government itself would build this ditch; and that at the same conversation Mr. Heinrich stated to Mr. Reynolds in my presence that if that was the case he would not construct the ditch that he had proposed to build to irrigate this land.

Mr. BALDWIN: We renew our objection.

The COURT: Yes, the offer is denied.

(Testimony of Matt Tschirgi.)

The per acre cost of construction of the Farmers Alliance Ditch was about $7.50 per acre. The Bozeman Trail Ditch was started in 1919 and completed in 1920. The cost of operating the Farmers Alliance Ditch is about 20¢ per acre per year.

As soon as I purchased the land I was informed that the Government ditch was not going to be built immediately, and I then constructed a ditch upon these lands. To make the cost reasonable it was necessary for Mr. Schroeder and Mr. Small and myself to take out a ditch together to cover this land.

Cross-Examination of
MATT H. TSCHIRGI

By Mr. BALDWIN:

We started the construction of this ditch in the fall of 1915. We had no letters from the Secretary of the Interior authorizing that construction, nor from the Commission of Indian Affairs. I did not communicate with the United States Government or with the Secretary of the Interior, or the Commissioner of Indian Affairs.

I do not now own all of the lands of those people who joined with me in constructing this ditch. The ditch carries approximately 22 or 23 cubic feet of water per second of time. I do not know how much water I was taking out of the stream at the [392] time this complaint was filed in June of last year.

I had no more control of the headgate of this ditch than the other parties who were interested in it. The other parties interested in the Tschirgi

(Testimony of Matt Tschirgi.)

Ditch were the Schroeders, Mrs. Small's estate, Mrs. Barney LaDow, the Heinrich estate and Mr. Allison. The building of the ditch and the conveyance of the water was a joint operation.

I have no record of the amount of water flowing in the ditch in May. I did not keep any record of the amount of flow. The ditch reached the carrying capacity of 22 second feet when it was enlarged in 1919. The carrying capacity of the ditch as first constructed was about 10 cubic feet of water per second of time. At the time this ditch was first constructed there were Government ditches in operation on the reservation. These Government ditches that were in operation at that time were the Big Horn Ditch, the Crow Agency Ditch, the Reno Ditch, Forty Mile Ditch and Upper Little Horn No. 2. They were being used then for the purpose of carrying water to the lands on the reservation for use in irrigating those lands. I knew that the Government was carrying out extensive operations for the purpose of developing Indian lands on the reservation, and to give the Indians an opportunity to profit from the land they owned. With that knowledge I commenced the construction of this ditch that I used at that time.

The Bozeman Trail Ditch, I believe, was started after we started the enlargement of the No. 1 Ditch in the spring of 1919. At that time I owned practically all of the land in question. Prior to the construction of this ditch through which I now get my water, I also owned land lying under Government

(Testimony of Matt Tschirgi.)

ditches. These lands were receiving waters from these Government ditches then. That Government ditch was Upper Little Horn No. 2, which is about one and a half miles below the point of diversion of the Tschirgi Ditch, from which [393] I now get my water. At the time we started the construction of the Tschirgi Ditch, the Antler Land Company did not own any land on the reservation.

In 1934 the Antler Land Company was irrigating a total of about 1500 acres under the Farmers Alliance, or Tschirgi, Ditch, and about 300 acres under the Government ditch called Upper Little Horn No. 2; about 537 acres of the 1500 were actually owned by the Antler Land Company. I cannot state on what particular piece of land any irrigation was going on under the Antler Land Company operations in June, 1934.

Up to the time they started to alternate water, the ditch was full. We started to irrigate about March 10. From that time on we ran a full stream, all the ditch would carry, until the first of June. After Superintendent O'Hara came up, we made arrangements for alternating the water. I knew that the river was lower than usual during 1934, which means a shortage of water. I knew that in 1934 that the land available for irrigation and requiring water would require all of the use of the water that year. There was also a shortage in 1932 and at times in 1933. There was not much snow in the mountains in the winter of 1934. I knew that the indications were that the usual supply of water

(Testimony of Matt Tschirgi.)

would not be running in the streams from that source. In the spring time of 1934 the rainfall was less than average.

In March, 1934 I knew that it was going to be necessary for proper irrigation for everyone to irrigate their lands when there was a surplus of water in the streams. I, therefore, turned water into my ditches and requested my neighbors under Government ditches to irrigate their lands when water was available, as it was apparent that there might be a shortage in June, July and August. Therefore I used all water possible while the early spring run off was taking place. I also used all water possible up until [394] June 20. The shortage of water on the reservation occurred about the first of June. During this three months period I carried the ditch full of water.

I continued to buy lands for the Antler Land Company after the ditch was completed. The Antler Land Company is still continuing that policy. During 1934, of the 537 acres of land belonging to the Antler Land Company, there were about 50 acres planted in beets. The other acreages included 400 acres of hay. The balance of the Antler Land Company land was planted in grain. Beets take more water than other crops.

Last year, in 1934, we irrigated our beets three times. The alfalfa hay was irrigated three times. On the balance of approximately 1000 acres that I had under cultivation last year, there were approximately 200 acres in beets. The remaining acreage

(Testimony of Matt Tschirgi.)

was planted in hay and oats. The beets on that acreage were irrigated three times, the hay three times and the oats once.

I knew that other people down the valley were at times during the irrigation season without water. My experience is that it takes an average of a half inch of water to irrigate the various crops with which I am familiar, that is, alfalfa hay, grain and sugar beets. It would take something between a half inch and an inch of water to irrigate an acre of beets; approximately half an inch of water to irrigate an acre of hay, and less than a half inch of water to irrigate an acre of oats.

I did not known the Indian allottees, Yellow Coyote, Young Duck, Mad Bear Wolf, Deaf Medicine Horse, Gives Away and The Wolf. I do not know whether or not they ever irrigated the lands described in the bill of complaint, or whether or not they ever lived upon them.

An objection was taken to this line of cross-examination by Mr. Burke of counsel for the defendants. The [395] objection was over-ruled by the Court and an exception taken.

I secured the information alleged in paragraph 10 of my answer "that they, the said predecessors in interest of the Antler Land Company, should not and must not attempt any irrigation of the said lands" from a conversation that was held between Mr. Heinrich and Mr. Reynolds, in which Mr. Reynolds told Mr. Heinrich that the Government was supposed to constr t this ditch and did

Testimony of Matt Tschirgi.)

t want him to construct the ditch on the line. Mrs. mall and Mr. Heinrich were told by the man in au- ority on the reservation that they should not and ust not attempt any irrigation of their lands.

When I took these lands over I had personal owledge that my predecessors had been told by e one in charge on the reservation, that they ould not and must not attempt irrigation of those nds. That statement applies to all the lands that e Antler Land Company claims in this case.

Redirect Examination of
MATT H. TSCHIRGI

y Mr. BURKE:

Mrs. Small was an Indian woman married to enry Small. She lived on this land that is now lled the "Barney LaDow" land. She worked in e Crow Agency office from 1908 to 1910.

The names of the Indian allottees who own lands at I lease and farm, and upon which I used water, e Chester Otter Chief, Mrs. David Yarlott, Rose hitehead, Lucy Yarlott, Carrie Coversup, Ster- g Lee Throssel and Robert Throssel. On this In- an land there were about 180 acres of beets raised, d 200 acres of alfalfa.

I enlarged the ditch because Mr. Asbury, the perintendent at Crow Agency, insisted upon my ilding a large enough ditch to cover all of the dian land under that ditch before he would give y permission to cross the lands with the ditch.

[96] This leased land was put under irrigation

(Testimony of Matt Tschirgi.)

under the Farmers Alliance Ditch in July, 1913. The first complaint made to me regarding the shortage of water in 1934, was in the latter part of June. Because of the noticeable shortage of snow in the mountains and the fact that the land was depleted of moisture, I started my irrigation in March, 1934. Before water was turned in Government ditches in May, 1934 I had irrigated all of my hay meadows once.

I. D. O'DONNELL,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Johnston, testified as follows:

I have lived in Montana 53 years. My principal business has been agriculture. I have actually farmed irrigated lands in this valley for the past 50 years. I have been superintendent, manager and president of a ditch company. I have built a number of irrigation systems around Billings. I was also employed by the Government from 1914 to 1918 as supervisor of irrigation on all the irrigation projects for seventeen arid states.

I know the amount of water necessary to grow crops on what we call sandy loam, sandy clay soil and gumbo soil. I have made practical experiments. The amount of water necessary for the proper irrigation of an acre of land for this character of soil is half an inch to an acre. A half an inch to the acre would be sufficient to irrigate the lands in the valley of the Little Big Horn River and Lodge-

(Testimony of I. D. O'Donnell.)

Cross-Examination of
I. D. O'DONNELL

By Mr. BALDWIN:

Sandy loam would be the lighter sandy soil, not a real light soil, but the lighter sandy loam, as we speak of it. Sandy clay is between the heavy and the light. Gumbo is the [397] heaviest clay soil we have. I do not know the type of land irrigated by the Antler Land Company in 1934. My testimony applies only to the general average.

In an ordinary season you can raise a crop of oats with one irrigation. Alfalfa requires two irrigations. My estimates are based upon a practical farmer handling the irrigation. I do not know how much water was required for the irrigation of lands in the Crow Reservation during 1934.

Redirect Examination of
I. D. O'DONNELL

By Mr. JOHNSTON:

I have raised a great many sugar beets during the past 27 years. During the 53 years that I have farmed in this valley, only two years, 1919 and 1934, have I had to irrigate to bring up grain crops. Those were by far the driest years I have ever known in this part of the State.

DOMINIC STEVENS,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination of Mr. Johnston, testified as follows:

(Testimony of Dominic Stevens.)

I have lived in Lodgegrass, Big Horn County, Montana for the past 40 years. I have known and lived near Oliver Peters during those years. When Mr. and Mrs. Peters first moved on the Alice Peters allotment they irrigated some of that land with water from Lodgegrass Creek. They started the construction of their irrigation ditch about 38 or 40 years ago on Mrs. Peters' place down the stream. They irrigated about 40 acres while they owned it. Afterwards they irrigated lands in the allotments of Alice, Arthur and George Peters. That was about 31 or 32 years ago. They irrigated about 40 or 50 acres in those three allotments.

Defendants' Exhibit One fairly represents the [398] actual course of Lodgegrass Creek across the lands and the irrigation ditches. The purple represents the irrigated lands on all of these allotments. I was living at Lodgegrass when the Dethlefsens purchased the Peters' allotments. Mr. Dethlefsen has irrigated all of those lands since he has been there. The crops raised there are grain and alfalfa.

E. C. WOODLEY,

was called as a witness in behalf of the defendants, and having been first duly sworn upon direct examination by Mr. Burke, testified as follows:

I live south of Wyola, Montana. I once owned the Crazy Head allotment, the south half of the northeast quarter of section 28, township 8 south of range 35 east.

(Testimony of E. C. Woodley.)

DEFENDANTS' EXHIBIT THIRTY-SIX
Admitted

(Defendants' Exhibit Thirty-six contains certified copies of the following instruments recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, as follows:

Warranty Deed from the First National Bank of Sheridan, Wyoming, to Edith O. Belken and Judy Walsh, Document No. 64844, Filed December 26, 1933; at 11:00 A. M. Dated May 12, 1932.

Patent from United States of America to Benson B. Belken, Document No. 32814, Filed April 6, 1925 at 9:25 o'clock, Dated March 4, 1920, and recorded in Book "2" of Patents, Page 326.

Patent from United States of America to E. C. Woodley, filed Aug. 13, 1917 at 9:10 A. M. Document No. 8559, Dated June 15, 1917.

Warranty Deed from Edward C. Woodley and Helen E. Woodley to B. B. Belken and Edith C. Belken, Document No. 15324, Filed Oct. 22, 1919 at 9:40 A. M. Dated Sept. 29, 1919.

The two patents are identical in terms with Defendants' Exhibit Nineteen, and the two deeds are identical in terms with Defendants' Exhibit Twenty. [399]

I purchased this land at a Government land sale of Indian lands at Crow Agency. I purchased this

(Testimony of E. C. Woodley.)

land during midwinter. The following spring I received a patent. I put a crop in that year.

A former survey had been made to build a ditch in this locality, and I took the matter up with Mr. Lewis. The result was that between Mr. Estep and Mr. Lewis, I was to build the ditch with the understanding that I could take out a ditch and enlarge my ditch, which would not interefere in any with the former survey.

The part colored yellow on Defendants' Exhibit Twelve designates the land which I purchased. I constructed the ditch and it is still on the land. Water is diverted through the ditch from the Little Horn River. The ditch runs in a northeasterly direction to the corner of this eighty. The ditch was constructed the second spring after I bought the property, and water was turned on the land the first few days in July. 72 acres were irrigated from this ditch. I continued irrigating until I sold the property to Belken. While I owned the property I raised wheat and small grain.

Cross-Examination of
E. C. WOODLEY

By Mr. ALLAN:

I never received any permission from the Commissioner of Indian Affairs or the Secretary of the Interior to construct this ditch.

EDWARD SCHROEDER,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Burke, testified as follows:

I am the same Edward Schroeder who has been referred to here in the testimony in regard to a ditch known as the Farmers Alliance Ditch. That ditch covers about 70 acres of [400] three allotments owned by my children and my wife. My wife and children are members of the Crow Tribe of Indians.

I was one of the people who constructed this ditch in 1916. Mrs. Mattie Williams Small and Mr. Matt Tschirgi and I were associated together in the construction of this ditch. Mrs. Small was a member of the Crow Tribe. We had a survey made and filed on the water and contracted the construction of the ditch. Water was first run on the land in 1917.

There was a survey crew in this locality of the Government, running a preliminary line before the ditch was constructed. I saw the crew working. They just ran a preliminary line there to put in a Government ditch. This preliminary survey ran a little below our ditch and eliminated our lands. Therefore, we went up higher and started a ditch up the river to cover those little bottoms without running across them.

The Government survey was run in 1903. In 1934 Mr. Tschirgi and I controlled the headgates on the Farmers Alliance Ditch.

(Testimony of Edward Schroeder.)

The following offer of proof was then made by Mr. Burke of counsel for the defendant Antler Land Company:

"The defendant Antler Land Company offers to prove by the witness Ed Schroeder that when Special Allotting Agent John K. Rankin allotted the lands under the Farmers Alliance Ditch, which belonged—which were allotted to the members of his family, that Mr. Rankin advised him that the lands which are now under the Farmers Alliance Ditch were allotted as irrigable lands, pursuant to his instructions from the Commissioner of Indian Affairs."

The offer was rejected by the Court.

Cross-Examination of
EDWARD SCHROEDER

By Mr. BROWN:

I constructed the Tschirgi Ditch so that it would [401] carry water to my land. The headgate was moved up the river.

J. R. BOYD

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Burke, testified as follows:

I live ten miles south of Wyola. I have been in the ranching and cattle business in that vicinity for 28 years. I have owned land in the Upper Little Horn Valley for the past 25 years.

(Testimony of J. R. Boyd.)

Through this witness Mr. Burke of counsel for the defendant Antler Land Company, made the following offer of proof:

"The defendant Antler Land Company offers to prove by the witness J. R. Boyd that at a conversation held on the Upper Little Horn in the summer of 1910, at which were present Mr. John Lewis, of the United States Indian Irrigation Service at Crow Agency. Mr. Frank M. Heinrich and Superintendent S. G. Reynolds, Superintendent of the Crow Indian Reservation; that Mr. Lewis stated to Mr. Boyd and Mr. Tschirgi that the United States had surveyed ditches known as Upper Little Horn Number Two and Upper Little Horn Number One, and that the United States intended to and would construct irrigation ditches on those surveys and that Mr. Heinrich stated—Mr. Heinrich and Mr. Boyd stated to Mr. Lewis and Mr. Reynolds, that they had land under what is now known as Upper Little Horn Number Two and wanted to construct a private ditch of their own, and that Mr. Heinrich told Mr. Reynolds and Mr. Lewis that he had lands under what is now known as Farmers Alliance Ditch and which was referred to then as Upper Little Horn Number One Ditch; and that he intended to take an irrigation ditch out of the Little Horn River to irrigate those lands and that both Mr. Reynolds and Mr. Lewis told Mr. [402] Heinrich and Mr. Boyd at that time that they should not take out these ditches, that the United States intended to take out the ditches and to build them

(Testimony of J. R. Boyd.)

and that if these people took out private ditches there, it would interfere with the Government's plan of taking out one ditch; that it would be a waste of money, because the Government intended to build the ditch; and that the one large ditch would be much better than a number of small ditches for the Government and for the land-owners."

This offer was refused by the Court.

I saw notices of appropriation by the United States Government for the No. 2 ditch, posted on a big rock opposite the Small place. Notices of appropriation for Upper Little Horn No. 1 were posted along the trail above the Schroeder place. This was in 1907.

FRED E. MILLER,

was called as a witness in behalf of the defendants, and having been first duly sworn upon direct examination by Mr. Burke, testified as follows:

In 1901 I was Clerk in the Crow Agency Indian Office, and three years later I was Chief Clerk and continued as such until April, 1910. I was acquainted with Agent John C. Edwards in charge of the Reservation and Walter B. Hill in charge of irrigation on the Crow Indian Reservation. I am acquainted with the lands under the Farmers Alliance Ditch and was employed in the Crow Agency Office when these lands were sold at Indian sale. I know there was a Government survey of Upper Little Horn Ditch No. 1.

(Testimony of Fred E. Miller.)

Through this witness Mr. Burke of counsel for the defendant Antler Land Company, made the following offer of proof:

"The defendant Antler Land Company offers to prove by the witness Fred E. Miller, that Fred E. Miller was chief clerk at the Crow Agency Indian Office at the United States Indian Service during the period from 1906 to 1910. That as such chief clerk it was his duty to advise persons doing business with, or attempting to do business with, said Indian Office as to Indian Office matters. That in 1909 and 1910 S. G. Reynolds was agent at Crow Agency and was in charge of the reservation. That prior to 1910 agent Reynolds told the said Fred E. Miller that the Government would construct irrigation ditches on the Upper Little Horn [403] in accordance with the surveys of Upper Little Horn Ditch Number One and Upper Little Horn Ditch Number Three, and the said Reynolds instructed him to so advise all persons who might be prospective purchasers of land lying under these ditches, that the Government would construct the said ditches. That he, the said Fred E. Miller, so advised all persons who sought information regarding the said lands and that he did so advise one Frank M. Heinrich at various times during the years of 1909 and 1910."

This offer was refused by the Court.

ROBERT J. MILLER,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Harwood, testified as follows:

DEFENDANTS' EXHIBIT THIRTY-SEVEN
Admitted

(Defendants' Exhibit Thirty-seven contains certified copies of the following instruments recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, as follows:

Patent from United States of America to Frank M. Heinrich, Document No. 48, Filed February 8, 1913, Dated Apr. 23, 1909.

Patent from United States of America to Frank M. Heinrich, Document No. 64, Filed February 8, 1913, Dated July 11, 1910.

Patent from United States of America to Frank M. Heinrich, Document No. 76, filed Feb. 8, 1913, at 4:15 P. M. Dated Feb. 9, 1911.

Patent from United States of America to R. J. Miller, Document No. 40681, Filed Sept. 19, 1927 at 1:20 P. M. Dated Aug. 20, 1926.

Patent from United States of America to Robert J. Miller, Document No. 55509, filed May 6, 1931 at 11:05 A. M. Dated Feb. 25, 1921.

(Testimony of Robert J. Miller.)

Warranty Deed from F. M. Heinrich to Charles Heinrich, filed April 21, 1915 at 10:05 A. M. Document #3094, dated December 1, 1914.

Warranty Deed from Charles Heinrich and Neliie Heinrich to Robert J. Miller, Document #3615, Filed Aug. 18, 1915 at 9:00 A. M. and dated July 16, 1915. [404]

he patents are identical in terms with Defendts' Exhibit Nineteen, and the two warranty Deeds e identical in terms with Defendants' Exhibit wenty.)

I have lived thirteen miles southwest of Lodgeass for twenty-one years. I am a rancher and am gaged in stock raising.

The portion marked "Robert J. Miller" on aintiff's Exhibit Two designates the lands which own as described in the complaint and the answer. irrigate 143 acres and have been irrigating them ery season since 1915. I acquired these lands om Charles Heinrich. The irrigation ditch was ere when I bought the lands. Mr. Brock conructed this ditch in 1913. The ditch was one mile ng. It carries approximately 150 miner's inches water, and is of sufficient size to irrigate my nds. It is taken out at the northeast corner of ction twenty-nine, and travels northeast through y land.

In June, at the request of the ditch rider, I shut y water off.

(Testimony of Robert J. Miller.)

DEFENDANTS' EXHIBIT THIRTY-EIGHT
Admitted

(Defendants' Exhibit Thirty-eight is a Notice of Appropriation of water, signed by W. W. Scott, dated August 1st, 1912.

Clerks File 8823

Location of Water Right. Lodge Grass Ditch No. 3, Notice of Appropriation. State of Montana. County of Rosebud. ss. To all whom these presents may concern:

Be it known, that I, W. W. Scott, U. S. Supt., for and in behalf of the Crow Indians, of Crow Reservation in said County and State, do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That said Crow Indians have a legal right to the use, possession and control of and claim three hundred and forty three (343) inches of the waters of Lodge Grass Creek in said County and State, for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for irrigating allotted lands situated in T. 7S. R. 34E. Secs. 26, 21, 22, 16 and 15 (343) acres.

III. That the means of diversion, with size of flume, ditch, pipe or acqueduct by which they intend to divert the said water is as follows: A ditch 36 inches on the bottom by 24 inches deep inches in size, which carries and conducts

timony of Robert J. Miller.)

343 inches of water from said stream which said ditch diverts the water from said stream at a point upon its left bank, and runs thence from said point which is S. 9° 0′ W. 500 feet from S. W. Corner Sec. 21, through Sections 28, 21, 16 and terminating in section 15, all in T. 7 S. R. 34 E. thence over and upon said land (or mining claim).

IV. That said Indians appropriated and took said water on the ..... day of June, A. D. 1906 by means of said ditch.

V. That the name of the appropriator of said water is W. W. Scott for and in behalf of the Crow Indians allotted under this ditch.

VI. That said Indians also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed or to be constructed, by said Indians in appropriating, and in using said water.

VII. That said Indians also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same, all and singular, under any and all laws National and State, and in

(Testimony of Robert J. Miller.)

accordance with all rulings and decisions thereunder, in the matter of water rights.

Together with all and singular, the hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

Witness my hand at Crow Agency, Montana. this first day of August, 1912.

W. W. SCOTT.

State of Montana,
County of Rosebud—ss.

W. W. Scott, Supt. having first been duly sworn, depose and say that he is of lawful age and is the appropriator and claimant of the water and water right mentioned in the foregoing notice of appropriation and claim and the person whose name is subscribed thereto as the appropriator and claimant, that he knows the contents of said foregoing notice and that the matters and things therein stated are true.

W. W. SCOTT.

Subscribed and sworn to before me this first day of August, 1912.

[Seal] THOMAS C. SMITH,
Notary Public for the State of Montana, Residing at Crow Agency, Montana.

My commission expires May 15, 1914.

Filed Aug. 17, 1912 9 A. M. Fee $2.00. R. J. Cole, Clerk and Recorder.

estimony of Robert J. Miller.)
Transcribed from permanent records Rosebud unty Water Rights Book #2 Page 342.
Recorded in Book "A" Miscellaneous and Water ght Record, Page 563.

W. J. BROCK,

s called as a witness in behalf of the defendants, d having been first duly sworn, upon direct ex- ination by Mr. Harwood testified as follows:

I have lived at Wyola, Montana on the Crow servation for the past twenty-five years. I am ac- ainted with the Robert Miller lands and the irri- tion ditches thereon. I farmed [405] the Robert ller ranch from 1913 to 1916 and built the ditch signated as the "Robert Miller Ditch" on Plain- f's Exhibit Two. The ditch carried enough water irrigate 160 acres. Before I started farming this nd it was brush land and timber and had to be ared. Since 1916 I know that they have been irri- ing this land.

Cross-Examination of
W. J. BROCK

Mr. BROWN:

The ditch is approximately one mile long, about feet wide on the top and about 2½ to 3 feet on bottom.

ROBERT J. MILLER,

was recalled as a witness in behalf of the defendants, and having been previously sworn, upon direct examination by Mr. Harwood testified as follows:

The Court at the request of counsel permitted an amendment of the defendants' answer so that the description of the Robert J. Miller land contained therein would conform to the description of the land in the patents introduced as Defendants' Exhibit Thirty-seven.

Some of the irrigated portions of my land lie in the East Half of the Northwest Quarter of Section Twenty-one; some of it in the Southwest quarter of the Northwest Quarter of Section Twenty-one; some in the Northwest Quarter of the Southeast Quarter of Section Twenty-one, and some in the North Half of the Southwest Quarter of Section Twenty-one. And there is some in the South Half of the Southwest Quarter of Section Twenty-one.

The ditch does not run over 40 feet from the dam to where it enters my land. I commence irrigating about 500 feet from the dam. There is very little seepage in the ditch. [406]

W. A. MILLER,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Harwood testified as follows:

(Testimony of W. A. Miller.)

I am one of the defendants in this action, the same person as Billie Miller named in the plaintiff's complaint. I have lived on the Crow Indian Reservation for the past eighteen years on lands which I own.

I acquired this place through an Indian land sale at Crow Agency.

DEFENDANTS' EXHIBIT THIRTY-NINE
Admitted

(Defendants' Exhibit Thirty-nine is a patent from the United States of America to Billie Miller, dated January 9, 1926 to the South Half of the Southeast Quarter of Section Twenty, and the East Half of the Northwest Quarter, and the Northeast Quarter of Section Twenty-nine in Township Seven South of Range Thirty-four East of the Montana Meridian, Montana, containing three hundred twenty acres. This patent is identical in terms with Defendants' Exhibit Nineteen.)

My lands are shown on Plaintiff's Exhibit Two. The following spring after the Indian land sale in 1926, I took steps to irrigate this land. The location of the ditch is designated on Plaintiff's Exhibit Two by the number "10" in white chalk. The ditch is about a mile and a quarter in length, and has a carrying capacity of 80 miner's inches.

I irrigate about 110 and a half acres. This irrigable area was determined by a survey in the summer of 1934 made by a civil engineer. I have a little land which I irrigate in the Southwest

(Testimony of W. A. Miller.)

Quarter of the Southeast Quarter of Section Twenty, some in the Southeast Quarter of the Southeast Quarter of Section [407] Twenty, and the balance is in the Southeast Quarter of Section Twenty-nine. This irrigation is done on these lands which I purchased at the Government sale. I have been irrigating these lands since I completed the ditch in 1926. The crops raised on that land are principally timothy and clover hay. I employed Mr. Frank Goe to work on the ditch.

Cross-Examination of
W. A. MILLER

By Mr. BROWN:

The ditch is about a foot and a half wide at the bottom, and about four and one-half feet wide at the top. It is about a foot and one-half deep. As I recall, I paid between $10.00 and $12.00 an acre for the land I purchased at this Government sale.

Redirect Examination of
W. A. MILLER

By Mr. HARWOOD:

As I remember, I bought this land for a lump sum. At the time of the sale I figured that the land not irrigated was worth about half what the irrigated land was worth.

FRANK GOE,

was called as a witness for the defendants, and having been first duly sworn, upon direct examination by Mr. Harwood, testified as follows:

I have lived on the Crow Indian Reservation for the past 16 years. I was employed in April, 1926 by Mr. Billie Miller to assist in the construction of his ditch to carry water from Lodgegrass Creek to Mr. Miller's lands. The work was completed about July 1, 1926.

JOSEPH L. HENMAN,

was called as a witness in behalf of the defendants, and having [408] been first duly sworn, upon direct examination by Mr. Burke, testified as follows:

DEFENDANTS' EXHIBIT FORTY
Admitted

Defendants' Exhibit Forty contains certified copies of the following instruments recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, as follows:

Patent from United States of America to Frank M. Heinrich, Document No. 1232, Filed Jan. 8, 1914 at 9:35 o'clock A. M., Dated August 8, 1912.

Patent from United States of America to Bah-Sukese, or Goes Ahead, an Indian of the Crow Tribe, Document No. 66146, Filed May 7, 1934 at 9:00 A. M., Dated Nov. 14, 1907.

(Testimony of Joseph L. Henman.)

Patent from United States of America
Frank M. Heinrich, Document No.
Filed February 8, 1913 at 3:00 o'cl
P. M., Dated July 22, 1909.

Deed Incompetent Indian Lands from G
Ahead, Crow Allottee 1166, and his w
Pretty Shield, to F. M. Heinrich, Do
ment No. 14728, Filed July 30, 1919
3:00 P. M., Dated June 22, 1917.

Certified Copy of Order Confirming Sale
Jay L. Henman and Ruth Henman, fr
Ford E. Hovey and Matt H. Tschir
executors of the last will and testament
Frank M. Heinrich, deceased, to Jay
Henman, and Ruth Henman, Docum
No. 66123, Filed May 3, 1934 at 3
o'clock P. M., Dated May 3, 1934.

Executor's Deed, from Ford E. Hovey a
Matt H. Tschirgi, executors of the last w
of Frank M. Heinrich, deceased to Jay
Henman and Ruth Henman, Document
67327, Filed Aug. 29, 1935 at 1:00 P.
Dated May 3, 1934.

The patents are identical in terms with Defe
ants' Exhibit Nineteen. The instruments plac
title in Jay L. Henman and Ruth Henman are
the usual form pursuant to Montana law. T
Executor's Deed conveys the property therein
scribed, together with the tenements, heredi
ments and appurtenances whatsoever to the sa
belonging or in anywise appertaining.)

(Testimony of Joseph L. Henman.)

At this time the defendants, Jay L. Henman and Ruth Henman, were given leave by the Court and without objection by plaintiff, to amend paragraph 66 of their answer as follows:

"That the southeast quarter of the southeast quarter of section four in township five south of range thirty-five East, is the allotment of Pretty Shield, number 1167, and that Pretty Shield, prior to her death, executed and delivered to F. M. Heinrich, the predecessor in interest of these defendants, a non-competent Indian land deed; which was approved by the Secretary of the Interior pursuant to the statutes in force and effect at that time." [409]

I am one of the defendants in this action. Ruth Henman is my wife. I use water from the Little Big Horn River on the lands described in plaintiff's bill of complaint. I first used water on these lands in 1930. There was a ditch on these lands when I purchased the same.

I now have approximately 60 acres under cultivation which are irrigated through this ditch. I irrigate 30.4 acres in the Southeast Quarter of the Southeast Quarter of Section Four; 15.2 acres in the Northwest Quarter of the Southeast Quarter of Section Four, and 13 acres in the Southeast Quarter of the Northeast Quarter of Section Four. I have continuously irrigated these lands since 1930. The ditch is thirty-six inches across at the top and twenty-two inches across the bottom, by

(Testimony of Joseph L. Henman.)

eight inches deep. This ditch is what is known as a high water ditch. It is higher than the normal flow of the river.

Cross-Examination of
JOSEPH L. HENMAN

By Mr. BROWN:

I use water in early May and through May and as far as I can in June. Until approximately the tenth of June on, I do not get any water. The water ordinarily does not come into the ditch after the middle of June. I did not use any water in 1933 during August. I did not use any water in August, 1930, 1931, 1932.

VINCENT K. HAFNER,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Burke testified as follows:

I live nine miles north of Lodgegrass, about a mile and a quarter north of the Henman land. In 1923 I worked on the Henman ditch constructing a dam. In 1931 I cleaned the ditch and put in a dam again in practically the same place. Since 1923 [410] there has been water carried through this ditch. There has been hay irrigated there since that time.

(Testimony of Vincent K. Hafner.)

Cross-Examination of

VINCENT K. HAFNER

By Mr. BROWN:

The construction of this ditch was commenced in 1920 and completed in 1921.

HENRY G. CAMPBELL,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Burke, testified as follows:

DEFENDANTS' EXHIBIT FORTY-ONE
Admitted

(Defendants' Exhibit Forty-one contains certified copies of the following instruments recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, as follows:

Deed from First National Bank of Hardin, Hardin, Mont. to Ford E. Hovey and Matt H. Tschirgi, executors of the last will and testament of Frank M. Heinrich, deceased, Document No. 51581, filed May 9, 1930, at 2:25 P. M., Dated May 8, 1930.

Patent from United States of America to F. M. Heinrich, Document No. 10997, Filed May 7, 1918 at 9:25 o'clock A. M., Dated March 28, 1910.

(Testimony of Henry G. Campbell.)

Warranty Deed from Frank M. Heinrich t
Samuel G. Reynolds, Document No. 11000
Filed May 7, 1918, Dated Jan. 23, 1911, an
recorded in "7" of Deeds, Page 342.

Sheriff's Deed from John B. Shreve, Sheriff, t
First National Bank of Hardin, Montana
Document No. 49045, Filed Oct. 18, 1929
Dated Oct. 17, 1929.

Order Confirming Sale to Mabel E. Pace from
Ford E. Hovey and Matt H. Tschirgi
executors of the last will and testament o
Frank M. Heinrich, deceased, to Mabel E
Pace, Document No. 51287, Filed April 17
1930 at 2:20 P. M. Dated April 17, 1930.

Executor's Deed from Ford E. Hovey and Matt
H. Tschirgi, executors of the last will and
testament of Frank M. Heinrich, deceased
to Mabel E. Pace, Document No. 52163
Filed June 26, 1930 at 3:10 P. M., Dated
June 2, 1930.

The patents are identical in terms with Defendants' Exhibit [411] Nineteen. The Deed from the First National Bank, a warranty deed, is identical in terms with Defendants' Exhibit Twenty. The Sheriff's Deed, the Order Confirming Sale and the Executor's Deed are drawn in the usual form pursuant to Montana law. The executors convey in their deed to Mabel E. Pace all of the right, title and interest and estate of the said Frank M. Heinrich, deceased, at the time of his death, and of the

(Testimony of Henry G. Campbell.)

estate of the said Frank M. Heinrich, deceased, in and to the property therein described, together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.)

I am in control and possession of the South Half of the Southwest Quarter, and the Northeast Quarter of the Southwest Quarter of Section Twenty-eight, Township Eight South of Range Thirty-five East. Mabel E. Pace is the owner of these lands.

DEFENDANTS' EXHIBIT FORTY-TWO
Admitted

(Defendants' Exhibit Forty-two is a plat of the H. G. Campbell ranch. It is certified to the Circuit Court of Appeals as a part of the records in this case.)

58½ acres are irrigated on the South Half of the Southwest Quarter of Section Twenty-eight. 15.1 acres on the Northeast Quarter of the Southwest Quarter of Section Twenty-eight in Township Eight South of Range Thirty-five. Water is conveyed to these lands by a ditch about three feet wide on the bottom and four feet on the top, and about fifteen inches deep when the water is running. The diversion is made from the Little Big Horn River. A figure "8" on Plaintiff's Exhibit Two designates the location of this ditch. Mrs. Belken and Judy Walsh also take water through [412] this ditch after it leaves me.

(Testimony of Henry G. Campbell.)

This acreage has been irrigated since 1917 or 1918.

I also have a water wheel in the river which I use to generate power for an electric light plant. The mark "x" on Defendants' Exhibit Forty-two indicates the location of the water wheel. This water used for the water wheel empties right back into the river.

Cross-Examination of
HENRY G. CAMPBELL

By Mr. BROWN:

I am taking care of this land for Mabel Pace. The eight years I have been there, I have raised grain and hay. During May and a part of June the ditch was about two-thirds full of water, in 1934. I shut down part of the time in June and July, 1934. The ditch was never full after June of 1934. The figure "20" on Plaintiff's Exhibit Two designates the location of the water wheel.

Redirect Examination of
HENRY G. CAMPBELL

By Mr. BURKE:

During 1934 Mr. C. E. Lewis, the Government Engineer, gave me permission to run water over the water wheel.

JUDY WALSH,

as called as a witness in behalf of the defendants, nd having been first duly sworn, upon direct examination of Mr. Burke, testified as follows:

DEFENDANTS' EXHIBIT FORTY-THREE
Admitted

(Defendants' Exhibit Forty-three is a Warranty eed dated April 13, 1931 from Benson B. Belken nd Edith G. Belken, [413] his wife, to The First ational Bank of Sheridan, Sheridan Wyoming, to e Southeast Quarter of the Northwest Quarter, e South Half of the Northeast Quarter and the outheast Quarter of the Southeast Quarter of Sec-on Twenty-eight; the Northeast Quarter of the ortheast Quarter of Section thirty-three, and orthwest Quarter of Section Thirty-four, in ownship Eight South of Range Thirty-five East the Montana Principal Meridian. It is identical terms with Defendants' Exhibit Twenty.)

DEFENDANTS' EXHIBIT FORTY-FOUR
Admitted

(Defendants' Exhibit Forty-four is a patent from e United States of America, dated March 4, 1920, Benson B. Belken, to the Southeast Quarter of e Northwest Quarter of Section Twenty-eight in ownship Eight South of Range Thirty-five East the Montana Meridian, Montana. This patent is entical in terms with Defendants' Exhibit Nine-en.)

(Testimony of Judy Walsh.)

I have lived about two and one-half miles from Wyola, Montana, about sixteen years. My mother, Mrs. Belken, and I own the Crazy Head and Paints Pretty allotments described as the South Half of the Northeast Quarter, and the Southeast Quarter of the Northwest Quarter of Section Twenty-eight, Township Eight South of Range Thirty-five East. We irrigate eighty acres of these lands. Water has been used on this acreage since 1918. The crops raised are grain, oats and hay. We are under the Campbell Ditch.

At this time it was agreed by counsel that the Little Horn River and the Little Big Horn River are one and the same stream. [414]

DEFENDANTS' EXHIBIT FORTY-FIVE
Admitted

(Defendants' Exhibit Forty-five is a certified copy of a Notice of Appropriation of wafers by The United States of America, dated July 25, 1914, made on the lands designated as Upper Little Horn No. 1, and filed in the office of the County Clerk and Recorder of Big Horn County, Montana. This Notice of Appropriation is identical in terms with Defendants' Exhibit Thirty-one. The Court received this exhibit in evidence subject to the general objection of the Plaintiff that the right of the Government could not be prejudiced or lost by any filing or act of any of its agents.

(Testimony of Judy Walsh.)

DEFENDANTS' EXHIBIT FORTY-SIX

Admitted

"United States
Department of the Interior
Office of Indian Affairs
Washington.

"Land-Allot
74561-20
17860-21
McP Mar. 19, 1921

Mr. Charles E. Roblin,
Special Allotting Agent,
Crow Agency, Montana.

My dear Mr. Roblin:

"Receipt is acknowledged of your letter of March 1, 1921, requesting instructions in certain specific cases connected with the allotment work on the Crow Reservation under the provisions of the Act of June 4, 1920 (41 Stat. L., 751).

"Our letter of general instructions to you, dated March 7, 1921 (approved by the Department March 10, 1921) has already been forwarded to you. This letter of general instructions will answer some of the questions which you now propound. Reference is made therein to the grant of sections 16 and 36 to the State of Montana for common school purposes (subject to certain conditions) "within the territory described herein," or such parts of said sections as may be nonmineral or nontimbered,

(Testimony of Judy Walsh.)

and for which the State has not heretofore received indemnity lands under existing laws; and you were informed that the Office has no notification from the State of the acceptance of the grant, but that in the meantime said sections should be reserved from allotment. Your general instructions on this point are so far modified as to permit the allotment of such numbered sections, or parts thereof, in case they are selected by the Indians; and in this event the State would be permitted to make lieu selections, with the approval of the Secretary of the [415] Interior.

"The expression, 'within the territory described herein,' is held to mean the unallotted portion of the reservation which is subject to allotment under the provisions of the said Act of June 4, 1920, supra.

"In case of the acceptance of the grant by the State you will be duly notified thereof either through this Office or the Agency, and you can then arrange with the proper state officials for a selection of the lands which they will appropriate under the grant. In the meantime, if desirable, you may ascertain by correspondence what school selections, if any, the State has already made in that portion of the reservation heretofore surveyed. Further than stated herein, the allotment work shall not be delayed or hindered to the end that State officials may cruise the reservation with a view to selecting lands. The foregoing is intended as instruc-

(Testimony of Judy Walsh.)

"You invite attention also the provision of section two of the Act, reading: 'The classification of the lands of such reservation for the purpose of allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.'

"With reference to this matter, you are instructed as follows: If the records and files of the Crow Agency show that the lands heretofore allotted have been classified, such classification shall stand as made, and shall be conclusive as to the character of the land for the purpose of the Act; and in all cases where an allotment, or part thereof, has not been classified, such allotment, or part thereof, shall be classified in the same manner as 'the unallotted allottable lands.' The classification of the lands should be made as directed by the Act of Congress approved June 25, 1910 (36 Stat. 859) on the basis of equalization provided therein, viz: 'That irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land'; however, not to exceed forty acres of irrigable

(Testimony of Judy Walsh.)

land can be allotted to any one Indian. The foregoing instruction is not to be construed as depriving two of the classes of persons of the acreage provided in the Act, viz: (1) To the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of the Act, 160 acres; (2) to every allotted member living at the date of the passage of the Act who may then be the head of a family and has not received allotment as such head of a family, 160 acres each; nor is it to be construed as depriving any person heretofore allotted of any land formerly allotted him or her; but such classification shall be considered in the prorating of the remaining unallotted allottable lands, according to the basis heretofore stated.

"Subject to the foregoing, you are further instructed 'to prorate the remaining unallotted allottable lands and allot them so that every enrolled member living on the date of the passage of the Act, and entitled to allotment, shall receive [416] in the aggregate an equal share of the allottable tribal lands for his total allotment of the lands of the Crow Tribe.

Very truly yours,

(Sgd) E. B. MERITT

3-ABM-22 Assistant Commissioner."

Approved: Mar. 30, 1921.

(Sgd) S. G. HOPKINS

Assistant Secretary."

(Testimony of Judy Walsh.)

DEFENDANTS' EXHIBIT FORTY-SEVEN
Admitted.

"United States
Department of the Interior
Office of Indian Affairs
Washington

"Land-Allot.
74561-20
8898-21 Mar. 7, 1921
McP.

Mr. Charles E. Roblin,
Special Alloting Agent,
Crow Agency, Montana.

My Dear Mr. Roblin:

"You have heretofore been instructed that upon completion of your work at Blackfeet Reservation, you should proceed to Crow Reservation, Montana, and take up the allotment work there, subject to the provisions of the Act of June 4, 1920 (41 Stat. 571); copy inclosed herewith. Referring to your letter of February 17, 1921, it is understood that you are now at the Crow Agency.

"It will be noted that the Act authorizes and directs the Secretary of the Interior to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, * * * among the members of the Crow

(Testimony of Judy Walsh.)

Tribe. It will be observed that three classes of persons are entitled to allotments, namely:

1. To the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of the Act, 160 acres.

2. To every allotted member living at the date of the passage of the Act who may then be the head of a family and has not received allotment as such head of a family, 160 acres each.

3. And thereafter to pro-rate the remaining unallotted allottable lands so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allottable tribal lands for his total allotment.

"Each of these classes should be allotted on a separate roll." [417]

"This latter roll should, of course, contain the names of the Indians receiving original allotments under the Act, and the names of all Indians heretofore allotted who are entitled to a pro rata proportion of the allottable lands.

"Various rulings have been made as to the right of prior selection, who constitutes the head of a family, and as to the meaning of certain clauses occurring in Sections 1 and 3 of the Act. The originals of these rulings are on file at the Agency and you will be governed by them in making the allotments.

(Testimony of Judy Walsh.)

"Your attention is invited to the provisions of Section 3 of the Act relating to the preparation of the rolls. These rolls are to be prepared by the Enrollment and Competency Commission, heretofore appointed, and it is assumed that they are about completing their work. It will be noted that said section (among other things) provides: "Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made." It follows that the rolls prepared by the said Commission constitute the "Allotment Rolls", which are to be completed by you by filling in the descriptions of land allotted or pro-rated to each individual Indian. This entirely relieves you of the necessity of preparing the rolls on which the allotments are to be made.

"As you have doubtless learned, certain of the townships and parts of townships on the reservation have not yet been surveyed. You are informed that on September 23, 1920, the attention of the Commissioner of the General Land Office was called to the matter, and he was requested to make the surveys as early as practicable. These lands, of course, cannot be allotted until the surveys have been completed. It is expected that the General Land Office will begin the surveys as soon as weather conditions will permit.

(Testimony of Judy Walsh.)

"Particular attention is invited to the fact that certain tracts and parcels of land are reserved from allotment as follows:

1. Such of the unallotted lands as are now used for agency, school, cemetery, or religious purposes shall remain reserved from allotment so long as such agency, school, cemetery, or religious institutions, respectively, are maintained for the benefit of the tribe . . . . and not more than 640 acres may be reserved for administrative purposes at the Crow Agency, and six tracts of not exceeding 80 acres each, in different districts on the reservation, may be reserved for recreation grounds for the common use of the tribe, or purchased from the tribal funds if no tribal lands are available, and all such lands shall be definitely described and made a matter of record by the Indian Office.

"Reservations have already been made for three of the recreation grounds, namely, for Big Horn District. Blacklodge District, and Pryor District. See Office letter of November 26, 1920, copy of which was sent to the Agency on December 13, 1920.

2. Any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved [418] from allotment or other disposition for the benefit of the Crow Tribe of Indians.

(Testimony of Judy Walsh.)

3. The grant of Sections 16 and 36, within the townships to be allotted to the State of Montana for the benefit of the public schools of the State, subject to the conditions and limitations therein mentioned. The Office has no notification from the State of the acceptance of the grant; but in the meantime the said sections should be reserved from allotment.

4. Reservations for administrative purposes and town-sites at the Crow Agency and Pryor Sub-agency, for the present park at Crow Agency not to be included in the town-sites, or to be subject to disposition. Selections for town-site purposes have already been made. See Office Letter of October 16, 1920, to the Department (Copy sent to Crow Agency October 20, 1920).

"All the foregoing reservations should be embodied in a "Schedule of Reserved Lands" and should be submitted in connection with the Allotment Schedules. Of course you should append an appropriate certificate to the schedule as well as to the Allotment Schedules.

"Your attention is also invited to the provisions of Section 13 in relation to the designation of homesteads, namely: "That every member of the Crow Tribe shall designate as a homestead 640 acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a period of twenty-five

(Testimony of Judy Walsh.)

years from the date of issuance of patent therefor, or until the death of the allottee."

"You are instructed that a separate schedule to be known as a "Schedule of Homestead Designations", should be prepared. By "separate schedule" is meant a schedule in addition to the Allotment Schedules (on which patents will issue) on which only the homestead lands shall appear. As this schedule should include "every enrolled member living on the date of the passage of this Act, and entitled to allotment," (many of whom have already been allotted) it follows that a part of the lands designated as "homesteads" will already have been patented. In such cases a notation to this effect should be placed opposite the patented descriptions thus: "Patented 3/5/10" (indicating the date of patent); and a notation should likewise be made on the allotment schedule thus: "Homestead".

"It will be seen from the foregoing that this is to be a schedule of information and for record use, and not for the issuance of patents thereon. It is assumed, however, that the homestead designations shall comprise the best lands of each allottee—lands, perhaps, containing their improvements; and the Indians or their representatives should be urged to designate their best lands as their homesteads.

"Each Indian of the age of discretion should be permitted to select his or her own allotment;

(Testimony of Judy Walsh.)

selections for minors are to be made by parents, if living, or by legal guardians. Selections for orphans (where no legal guardian has been appointed) are to be made by you. If any Indian has acquired [419] an equitable right to a specific tract by reason of prior occupancy, erection of improvements, or for other reasons, such right should be recognized, as far as practicable, by permitting him to select such tract. Each allotment should be definitely marked in a permanent manner with allotment posts and, as far as practicable, the locations shown to the allottees or their representatives.

"The schedules should be prepared in triplicate on the forms designated by the Enrollment and Competency Commission, as hereinbefore explained. On each schedule should be placed the allotment number, the name of the allottee, relationship, sex, age, and description of the land allotted to each Indian, as indicated by the column headings. On the last page of each copy of the several schedules should be appended a certificate to the effect that the allotments shown thereon were made in accordance with the provisions of the Act hereinbefore cited, and these instructions, indicating the date thereof. The certificate should be dated and signed by you, and the original and duplicate copies of the schedules transmitted to this Office on the

(Testimony of Judy Walsh.)

completion of your work, the triplicate to be filed at the Crow Agency.

"All allotments made hereunder (including the homestead designations heretofore mentioned) should be reproduced graphically on tracing cloth township plats (Form 5-177a), the allotment number to be shown in the diagram of the land assigned to each allottee, or indicated on the margin by some proper legend. Only one copy of the township plats need be prepared, which copy should be forwarded with the schedules.

"Monthly reports, in duplicate, showing the status of the allotment work, should be submitted to the Office in Form 5-230 within ten days after the expiration of each month. Certificates of selection (Form 5-201) should be issued to the Indians as evidence of the fact that they have selected certain lands for allotments (not including the homestead designations), and duplicate certificates of each selection retained by you until the allotment work has been completed, which duplicates should remain on file at the Agency.

"Doubtful questions respecting your work, not covered herein, which may arise from time to time, should be submitted to the Office, and specific instructions will be issued for your guidance.

(Testimony of Judy Walsh.)

"Please acknowledge receipt of these instructions and advise the Office of the present status of your work. A copy of these instructions will be sent to the Superintendent of the Crow Agency for his information, and he will be requested to cooperate with you in the allotment work in all practicable ways.

Very truly yours,
(Signed) E. B. MERITT
2-LM-25 Assistant Commissioner.

Approved: MAR 10 1921
(Signed) S. G. HOPKINS
Assistant Secretary." [420]

DEFENDANTS' EXHIBIT FORTY-EIGHT
Admitted.

"Land Allot.
28606-23
H V C June 15, 1923

My dear Mr. Spry:

"The schedule of allotments made to Indians of the Crow Reservation, Montana, under the act of June 4, 1920 (41 Stat. 751) and the accompanying schedules of reservations for administrative and other purposes, for lands granted to the State of Montana; and of lands to be patented in fee to 'competent' Indians, all of which were approved by the Department

(Testimony of Judy Walsh.)

June 7, 1923, has been sent to your office by special messenger.

"The approved letter of transmittal and the memorandum prepared in your office containing a list of exceptions, together with seven tracings on linen paper, submitted by the allotting agent to accompany the schedule are inclosed for your file. With regard to the excepted cases in conflict with other selections or reservations, these will be brought to the attention of the Superintendent of the Crow Agency with a view to adjustment. With regard to those selections enumerated in your memorandum, which are subject to rights of way previously granted, it is understood that patents will be issued for such selections (where no other valid objection exists) with the proper clause referring to such rights of way.

"Regarding the last paragraph of your memorandum which has reference to lands under irrigation projects, it may be said that a list of such lands will be prepared from information in this Office and when such list has been completed a clerk will be detailed from the Office to make proper notations on both copies of the schedule as to such lands. In the meantime, it is suggested that no patents be issued by your office for any lands on the Crow schedule.

(Testimony of Judy Walsh.)

which are now classified as irrigable under the initial 'I'.

Very truly yours,
(Signed) C. F. HAUKE,
Chief Clerk.

HON. WILLIAM SPRY,
Commissioner of the General
Land Office.
Copy for Crow Agency."

"29450-23
HVC April 26, 1923

"The foregoing roll containing the names of 1768 members of the Crow Tribe of Indians prepared and certified by the Crow Enrollment and Competency Commission pursuant to Section 12 of the Act of June 4, 1920 (41 Stat. 751), on which is indicated the adult Indians as 'competent' or 'incompetent' is submitted to the Secretary of the Interior with the recommendation that it be approved.

(Signed) C. F. HAUKE,
Chief Clerk. [421]

"Department of the Interior
Office of the Secretary
June 7, 1923

"The foregoing roll of members of the Crow Tribe of Indians, containing 1768 names is hereby approved.

(Signed) F. M. GOODWIN,
Assistant Secretary."

(Testimony of Judy Walsh.)

"29450-23

HVC April 26, 1923

"The Honorable

The Secretary of the Interior.

(Through the Commissioner of the General Land Office.)

Sir:

"There are submitted herewith schedules (in duplicate) of allotments, reservations, grants, etc.; of lands on the Crow Indian Reservation, Montana, made under the provisions of the Act approved June 4, 1920 (41 Stat. 751). The total number of allotments is 1768 embracing an area of 1,596,942.93 acres.

"These schedules were prepared by Mr. Charles E. Roblin, Special Allotting Agent, and the character of the selections are indicated on the schedules and in the attached letter from Mr. Roblin, under the following headings:

(1) Schedule of pro rata allotments (including lands allotted to allotted members of the Crow Tribe who were living and who were heads of families on June 4 or December 4, 1920, and who had not received full allotments as such). Pages 1 to 304.

(2) Schedule of reservations for 'Agency Administration', and various other purposes. Pages 306 to 310.

(3) Schedule of lands granted to the State of Montana. Pages 311 to 313.

(Testimony of Judy Walsh.)

(4) Schedule of lands to be patented in fee to 'competent' Indians. Pages 314 to 320.

"It is recommended that the schedules be approved (with such exceptions as may be noted by the General Land Office by reason of conflict, etc.) and referred to the Commissioner of the General Land Office with authority to issue patents, both trust and fee, in the names of the allottees enumerated thereon, pursuant to Section 1 of the Act of June 4, 1920 supra. As the Act is specific relative to the character of patents to be issued for the different classes of allotments, no comment is deemed necessary for the guidance of the General Land Office, except to call attention to the conditions, reservations, and limitations imposed by Section 6 relative to minerals, oil, gas, and coal, which are reserved for the benefit of the Crow Tribe; and to Section 15 relative to lands allotted and designated as 'homesteads.' [422]

"The schedules also contain a complete roll of Crow allottees, (106 pages, 1768 names) prepared and certified by the Enrollment Commission authorized by Section 12 of the Crow Act, each adult allottee being designated thereon as 'competent' or 'incompetent'. A separate roll prepared and certified by the Enrollment Commission containing a list of the allotted members of the Crow Tribe who were living and heads

(Testimony of Judy Walsh.)

of families June 4, 1920, or December 4, 1920, who had not received full allotments as such, is also submitted. Approval of both rolls is recommended.

"In submitting these schedules and accompanying rolls attention is invited to the large number of Indians concerned, the large area involved, and the urgent need for prompt action to subserve, so far as possible, the best interests of the Indians. In this connection it may be said that the Superintendent has urged early action on the schedules in order that the allotted lands may be leased advantageously for the benefit of the allottees with as little delay as possible. It is our purpose to notify the Superintendent immediately upon the approval of the allotment schedules and for the reasons herein given it is requested that the checking of the schedules in the Land Office and all necessary action thereon be expedited in so far as this may be done without interferring with work of a similar nature now pending.

Respectfully
(Signed) C. F. HAUKE.
Chief Clerk."

"General Land Office
Washington

"There are no reservations or withdrawals affecting the lands described in the schedules

(Testimony of Judy Walsh.)

referred to in the foregoing letter from the Indian Office and no reasons are known to this Office why patents should not be issued as recommended, except in the following enumerated cases which should be suspended pending adjustment. Exceptions:

See memo of Acting Asst. Commissioner of the General Land Office dated June 2, 1923.

Assistant Commissioner."

"Department of the Interior
Office of the Secretary

June 7, 1923

"The schedules enumerated above embracing lands on the Crow Indian Reservation, Montana, are hereby approved (with the exceptions indicated in the foregoing endorsements by the General Land Office) and referred to the Commissioner of the General Land Office for appropriate action in accordance with the recommendations of the Indian Office. The two rolls above referred to of members of the Crow Tribe, one of which is made a part of the allotment schedule, are also approved.

Signed F. M. GOODWIN,
Assistant Secretary." [423]

(Testimony of Judy Walsh.)

"HVC

April 26, 1923

"The foregoing schedule containing reserva tions of lands on the Crow Indian Reservation Montana, for 'Agency Administration,' 'Gov ernment Schools and Hospitals,' and for othe purposes, is submitted to the Secretary of th Interior with the recommendation that it b approved, one copy of the schedule to be for warded to the Commissioner of the Genera Land Office for record and the other retained in the Indian Office for a similar purpose.

C. F. HAUKE,
Chief Clerk.

"General Land Office
Washington.

"There are no reservations or withdrawals effecting the lands above described and no rea sons are known to this Office why the schedule should not be approved as recommended by the Indian Office.

See memo of Acting Asst. Commissioner of the General Land Office, dated June 2, 1923.

Assistant Commissioner."

Testimony of Judy Walsh.)

"Department of the Interior
Office of the Secretary

June 7, 1923

"Approved as recommended.
(Signed) F. M. GOODWIN,
Assistant Secretary."

"HVC

April 26, 1923

"The foregoing schedule of lands on the Crow Indian Reservation, Montana, granted to the State of Montana under Section 16 of the Act of June 4, 1920 (41 Stat. L. 751), cortaining 44,804.82 acres, is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

Signed C. F. HAUKE,
Chief Clerk."

"General Land Office
Washington.

"There are no reservations or withdrawals affecting the lands described in the above schedule granted to the State of Montana, and no reasons appear on the records of this Office why the said schedule should not be approved as [424] recommended by the Indian Office.

See memo of Acting Asst. Commissioner of the General Land Office dated June 2, 1923.

Assistant Commissioner."

(Testimony of Judy Walsh.)

"Department of the Interior
Office of the Secretary

June 7, 1923

"Approved as recommended.
(Signed) F. M. GOODWIN,
Assistant Secretary."

"HVC

April 26, 1923

"The foregoing schedule containing a list of applications for fee patents made by competent Indians of the Crow Reservation, is submitted to the Secretary of the Interior with the recommendation that it be approved and referred to the Commissioner of the General Land Office with authority to issue fee patents in the names of the allottees enumerated on said schedule, for the lands selected, pursuant to Section 1 of the Act of June 4, 1920 (41 Stat. 751).

Signed C. F. HAUKE,
Chief Clerk."

"General Land Office
Washington.

"There are no reservations or withdrawals affecting the lands described in the foregoing schedule and no reasons are known to this Office why fee patents should not be issued to the allottees enumerated thereon, with the following exceptions. Exceptions:

(Testimony of Judy Walsh.)

See memo of Acting Asst. Commissioner of the General Land Office, dated June 2, 1923.

Assistant Commissioner."

"Department of the Interior
Office of the Secretary.

June 7, 1923

"Approved as recommended and referred to the Commissioner of the General Land Office for appropriate action.

Signed F. M. GOODWIN,
Assistant Secretary." [425]

"Department of the Interior
Office of Indian Affairs
Washington

April 26, 1923

"The foregoing schedule containing 304 pages and 1768 names of allottees embracing lands on the Crow Indian Reservation, Montana, made under the provisions of the Act approved June 4, 1920 (41 Stat. L., 751) covering an area of 1,596,942.93 acres, is submitted to the Secretary of the Interior with the recommendation that it be approved (with such exceptions as may be noted by the General Land Office by reason of conflict, etc.) and referred to the Commissioner of the General Land Office with authority to issue patents, both trust and fee, in the names of the allottees enumerated there-

(Testimony of Judy Walsh.)

on, pursuant to Section 1 of the Act of June 4, 1920, supra.

Signed C. F. HAUKE,
Chief Clerk."

"General Land Office
Washington

"There are no reservations or withdrawals affecting the lands described in the attached schedule of allotments and no reasons are known to this Office why patents should not be issued as recommended, except in the following enumerated cases which should be suspended pending adjustment. Exceptions:

See memo of Acting Asst. Commissioner of the General Land Office dated June 2, 1923.

Assistant Commissioner."

"Department of the Interior
Office of the Secretary

June 7, 1923.

"The attached schedule of allotments embracing lands on the Crow Indian Reservation, Montana, is hereby approved (with certain exceptions indicated in the foregoing endorsement by the General Land Office), and the Commissioner of the General Land Office is authorized to issue patents, both trust and fee in accordance with the recommendations of the Indian Office.

Signed F. M. GOODWIN,

(Testimony of Judy Walsh.)

DEFENDANTS' EXHIBIT FORTY-NINE
Admitted.

(Defendants' Exhibit Forty-nine contains certified copies of official records of the Department of the Interior, the same being photostatic copies of the allotment schedule prepared by James C. Hatchitt, Special Alloting Agent. Only that portion of the exhibit is to be considered which contains the allotments of Number 1287—Strikes Feathers; Number 1289—Holds The Feather; Number 1290—Eagle; Number 1292—Does Anything; Number 1316—Little Face; Number 1317—Deaf; Number 1318—Medicine Horse; Number 1319—Yellow Coyote; Number 1320—Heifer Woman; Number 1321—Young Duck; Number 1322—Meat, also known as "The Meat"; Number 1323—The Back; Number 1328—Gives Away; Number 1502—Crazy Sister In Law; and Number 1504—Goes Ahead. This exhibit is certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT FIFTY
Admitted.

(Defendants' Exhibit Fifty is a certified copy of the official records of the Department of the Interior, showing photostatic copies of certain pages of the allotment schedule prepared by James R. Howard, United States Special Agent, and E. P. Briscoe, United States Indian Agent, allotting the

(Testimony of Judy Walsh.)

lands of Wrinkle Face, Allottee No. 1007. This exhibit is certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT FIFTY-ONE
Admitted.

(Defendants' Exhibit Fifty-one is a copy of sheets showing the Roblin allotments made under the Act of June 4, 1920 for certain Indian lands in the same locality of the lands of the defendants under the Tschirgi Ditch, but not directly involved in this case. This exhibit is certified to the Circuit Court of Appeals as a portion of the record in this case.) [427]

To Defendants' Exhibits Forty-nine, Fifty and Fifty-one plaintiff made the general objection that they were incompetent, which objection was overruled and an exception thereto was taken.

C. E. LEWIS,

was re-called as a witness for the defendants, and having been previously duly sworn, upon direct examination by Mr. Burke, testified as follows:

All of the irrigable land on the Little Horn and Lodgegrass water sheds, with the exception of a small acreage under two very small private ditches, is shown on Plaintiff's Exhibit Two.

At this time the defendants F. L. Yates and

(Testimony of C. E. Lewis.)

the answer of F. L. Yates and Emma E. Yates. Denial to the amendment by the plaintiff was likewise allowed. This amendment added as paragraph 1a immediately after paragraph 1 of the second counterclaim of the defendants Yates, on page 15 of the answer, the following:

"That prior to the year 1905, the plaintiff, through its special allotting agent John K. Rankin, duly and regularly allotted to one Back Bone, allottee Number 730, the above described tract of land as his individual property; that at said time the said Back Bone was a member of the said Crow tribe of Indians and was residing on the said Crow Indian Reservation in the State of Montana; that after the said tract of land was allotted to the said Indian, Back Bone, and after the reserved waters became vested to him and became appurtenant to said tract of land, the said Back Bone died and his said allotment was sold by the plaintiff as guardian of Indian wards at public sale to the said Lulu L. McClure, together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging and patent was duly issued and delivered to the said Lulu L. McClure as aforesaid."

(Testimony of C. E. Lewis.)

DEFENDANTS' EXHIBIT FIFTY-TWO
Admitted.

(Defendants' Exhibit Fifty-two is a patent from the United States of America to Lulu L. McClure, dated January 12, 1927 to the Northeast Quarter of Section Seventeen in Township Nine South of Range Thirty-three East of the Montana Meridian, Montana. This patent is identical in terms with Defendants' Exhibit Ninteen.) [428]

DEFENDANTS' EXHIBIT FIFTY-THREE
Admitted.

(Defendants' Exhibit Fifty-three is a warranty deed from Lulu L. McClure and Lewis T. McClure, wife and husband, to Emma Eames Yates, dated November 16, 1929 to the Northeast Quarter of Section Seventeen, Township Nine South, Range Thirty-three East, Montana Meridian, Montana. This warranty deed is identical in terms with Defendants' Exhibit Twenty.)

ROBERT YELLOWTAIL,

was called as a witness in behalf of the defendants, and having been first duly sworn, upon direct examination by Mr. Tansil testified as follows:

I am a member of the Crow Tribe of Indians, and at this time I am Superintendent of the Crow Reservation. I have an allotment of land near the

(Testimony of Robert Yellowtail.)

Yates ranch which is in the Northeast Quarter of Section Seventeen, Township Nine, Range Thirty-three. I built the Percheron Creek Ditch and used it some time between 1915 and 1920.

I think Mr. McClure bought the Yates land at a Government sale. Percheron Creek is a tributary to Lodgegrass Creek. The Yates have between 40 and 50 acres under the Percheron Ditch. When Mr. Yates purchased the land from Mr. McClure he did some cleaning on the ditch and has maintained it since then. Whenever water was available the Yates have used the Percheron Creek Ditch.

There was no water flowing in Percheron Creek during the months of June, July and August, 1934. This ditch only flows a small quantity of water for a very short period of time. The ditch is about three feet in the bottom, about four and one-half feet at the top, and about knee deep.

I am familiar with the Yates Lodgegrass Ditch. It is about a quarter of a mile long. This ditch was constructed shortly after Mr. Yates purchased the land from Mr. McClure. About seven acres of land are irrigated from that ditch. This ditch is [429] probably a foot and a half wide at the bottom. The diversion point of the Lodgegrass Ditch is about a quarter of a mile above Yates' house. It takes water out of Lodgegrass Creek.

(Testimony of Robert Yellowtail.)

DEFENDANTS EXHIBIT FIFTY-FOUR
Admitted.

(Defendants' Exhibit Fifty-four is a map of the Emma E. Yates ranch at Wyola, Montana. This exhibit is certified to the Circuit Court of Appeals as a portion of the record in this case.)

Defendants' Exhibit Fifty-four is a correct portrayal of the designations thereon.

O. E. PETERS,

was recalled as a witness for the defendants, and having been previously duly sworn, upon direct examination by Mr. Tansil, testified as follows:

I am acquainted with the Yates property and have been since 1915. Percheron Creek flows regularly only in the spring when the freshets are on or when the snow is coming out of the mountains. There is no water in the creek during the summer months. Mr. Yates has about 35 acres under irrigation which are irrigated from the Percheron Creek Ditch.

Immediately after Mr. Yates moved on this place he proceeded to use water from Percheron Creek through this ditch. He irrigates about four acres from Lodgegrass Creek. He has used it continuously as far as I know since he purchased the land.

C. E. LEWIS,

was recalled as a witness in behalf of the defendants, and having been previously duly sworn, upon direct examination by Mr. Burke, testified as follows: [430]

Referring to Defendants' Exhibit Twelve, the signature marked on there as "engineer" is the signature of my father, John Lewis, who was irrigation engineer at that time.

PLAINTIFF'S EXHIBIT FIFTY-FIVE
Admitted.

(Plaintiff's Exhibit Fifty-five is a letter dated March 9, 1935, from John Collier, Commissioner, to Kenneth R. L. Simmons. Pertinent portions of this letter are set out below.)

"This will acknowledge receipt of your letter of February 25 enclosing copy of 'Motion to Produce Documents' filed by certain counsel for the defendants in the pending Crow litigation.

"The old records of the Office have been very carefully searched with a view to securing copies of the various documents specified. There is enclosed herewith the following, numbered to correspond with the numbered paragraphs in the Motion.

1. Certified photostat copies of pertinent pages of certain unapproved allotment schedules showing selections of Crow Indians.

(Testimony of C. E. Lewis.)

2. The Office was unable to locate any designations made by Special Allotting Agent John K. Rankin as to the type of lands allotted by him. His schedules do not denote the nature of the lands allotted.

3. Certified copy of instructions given to Superintendent E. W. Estep, dated June 10, 1914, under which he filed notice of the appropriation of the water specified.

4. Certified copy of instruction dated April 6, 1905, to S. G. Reynolds, United States Indian Agent under authority of which he made the referred to filing of a certain quantity of the water of the Little Big Horn River.

5. The Office was unable to locate any field notes or surveys of the Upper Little Horn Ditch No. 1 and 3.

6. Certified photostat copies of pertinent pages of unapproved allotment schedules on which appear the names of certain allottees referred to in paragraph 6 of the Motion.

7. The Office was unable to locate any designations made by Special Allotting Agent John K. Rankin as to the type of lands allotted by him. His schedules do not denote the nature of the lands allotted.

8. Certified copies of the documents referred to in paragraph 8 of the Motion.

9. Certificate executed by the Acting Commissioner of Indian Affairs pursuant to para-

(Testimony of C. E. Lewis.)

10. Certified photostat copy of a map showing the location of the proposed Upper Little Horn Ditch No. 1. This is the only map that could be located.

"The foregoing list of documents enclosed herewith it appears are the only ones in the official records of this Office which would be in response to the demands of the defense counsel." [431]

C. E. LEWIS,

was recalled as a witness for the plaintiff in rebuttal, and having been previously duly sworn, upon direct examination by Mr. Brown testified as follows:

I never had that conversation with Mr. E. C. Woodley, the witness who testified that I gave him permission to build the Belken-Campbell Ditch.

The Court permitted an exception to all rulings of the Court without having them expressly noted and also extended the term until the statement of the evidence as signed, settled and approved.

Whereupon the Testimony Was Closed.

And now within the time allowed by law and orders of Court herein, the plaintiff and appellant lodges the foregoing proposed Statement of the

Evidence and asks the same be signed, settled and approved.

R. LEWIS BROWN,
Assistant United States Attorney,
KENNETH R. L. SIMMONS,
District Counsel, U. S. I. I. S.
Department of the Interior,
Counsel for Plaintiff.

Lodged this 13th day of October, 1936, with the Clerk of the above entitled Court.

C. R. GARLOW,
Clerk, United States District Court.
By: HAROLD L. ALLEN,
Deputy Clerk. [432]

CERTIFICATE OF JUDGE.

I, CHARLES N. PRAY, Judge of the above entitled Court, and the Judge before whom said cause was tried, hereby certify that the foregoing is a true and correct narrative statement of the evidence in the above entitled cause, and that the same is now by me hereby duly settled, allowed and approved within the judgment term, as the Statement of Evidence in said cause.

Dated this 30th day of November, 1936.

CHARLES N. PRAY,
Judge.

[Endorsed]: Lodged Oct. 13, 1936. Filed Nov. 30,

Thereafter, on December 1, 1936, Assignment of rrors was duly filed herein, in the words and gures following, to-wit: [434]

Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the Plaintiff in the above entitled use, and files the following Assignment of Errors pon which it relies in the prosecution of its ppeal from the decree in said suit made and ntered by the above entitled court on the 20th day f October, 1936.

1. The Court erred in finding and holding that he plaintiff, through its agents and officials on the row Indian Reservation, aided the Peters family r the construction of their irrigation ditch and hereby the Peters appropriation of water of Lodge rass Creek was known to, sanctioned and ac-uiesced by the Secretary of the Interior and the ommissioner of Indian Affairs.

2. The Court erred in finding and holding that ne-half miners' inch of water per acre at the oint of delivery for the proper irrigation of the nds belonging to the defendants [435] and the row Indians which are irrigable from the Little ig Horn River, Lodge Grass Creek and their ributaries.

3. The Court erred in finding and holding that he Crow Indians did not authorize the Secretary f the Interior to use or withhold the use of water n respect to any particular piece of land or any articular Indian.

4. The Court erred in finding and holding that the Secretary of the Interior has made no rules and regulations for a division of the waters of the Crow Indian Reservation among the various individual Indians or the various individually allotted tracts of land within said Reservation.

5. The Court erred in finding and holding that the Crow Indians, in their treaty with the United States in 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries at least to an extent necessary to irrigate all lands irrigable from such streams, or any of them.

6. The Court erred in finding and holding that these rights so reserved continued to exist against the United States and in favor of individual Indians and their grantees and successors in interest and the grantees in the aforesaid governmental sales and their successors in interest.

7. The Court erred in finding and holding that the purpose of the allotment act of February 18, 1887, was to provide for the distribution of water to individual Indians and that a just and equal distribution must be made and the duty devolved upon the Secretary of the Interior to provide rules and regulations therefor.

8. The Court erred in finding and holding that the waters upon the Reservation were reserved for the individual Indians and not for the Crow Tribe of Indians.

9. The Court erred in finding and holding that under the treaty of May 7, 1868, and under the patents issued by the [436] Government, each member of the Crow Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of forty acres, and that such vested right has a priority of May 7, 1868.

10. The Court erred in finding and holding that subject to that limitation of acreage, each irrigable acre is entitled to the same amount of water as any other acre on the Crow Indian Reservation and that in case of shortage of water, it is entitled to its pro rata share of the available water whether his land is under a government ditch or not.

11. The Court erred in finding and holding that the defendants, as owners and as lessors of the lands in question, have the same vested right to the use of the waters of said river, creek and their tributaries in the irrigation of their said land as their and their lessors' Indian predecessors in interest had before the alienation of such land.

12. The Court erred in finding and holding that the purchaser of such lands, either from the Indian allottee or at such government sales, acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantors.

13. The Court erred in finding and holding that the attempt of the plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters

of said river, creek and their tributaries to the exclusion of other members is an usurpation of power and illegal.

14. The Court erred in finding and holding that each defendant is entitled to a water right to the extent of one-half miner's inch of water per acre delivered on said land, for the actual acreage that was under irrigation at the time title passed from the Indian allottee by his deed or from the plaintiff at such sales of deceased Indian allotments and such increased acreage as the defendant, or his lessor, or his or his lessors' [437] predecessors in interest, may have placed under irrigation with reasonable diligence after securing title to such lands.

15. The Court erred in finding and holding that the aid given the Peters family in constructing the headgate of the Peters ditch creates the legal presumption that such aid was with the consent, knowledge and acquiescence of the Secretary of the Interior.

16. The Court erred in finding and holding the issues in said cause in favor of the defendants, and each of them, in accordance with their respective claims as set forth in their answer and in granting relief accordingly.

17. The Court erred in finding and holding that the plaintiff failed to make out a cause of action against said defendants, or any of them, and the plaintiff was entitled to no relief in said cause.

18. The Court erred in decreeing that plaintiff is entitled to no relief.

19. The Court erred in decreeing that by the treaty of May 7, 1868, the Crow Indians reserved the right to the use of the waters of the Little Big Horn River, Lodge Grass Creek and their tributaries to the extent necessary to irrigate all lands on the Crow Indian Reservation which are irrigable from said streams or any of them.

20. The Court erred in decreeing that the rights so reserved have continued to exist against the United States and in favor of individual Indians and their grantees and successors in interest and the grantees who acquired any of said lands at government sales of allotments to deceased Indians and the successors in interest of such grantees.

21. The Court erred in decreeing that each member of the Crow Tribe of Indians owning land on the Crow Indian Reservation irrigable from the waters of said streams, or any of them, secured a vested right to sufficient water therefrom to [438] irrigate his said land to the extent of at least forty acres in each allotment with a priority as of May 7, 1868.

22. The Court erred in decreeing that subject to limtiation of acreage, each irrigable acre is entitled to the same amount of water as any other acre irrigable from said streams, or any of them; that in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its pro rata share of the available water therefrom, whether such land is under a government ditch or not; that such right is vested in each and every grantee of any of such irrigable lands.

23. The Court erred in decreeing that said answering defendants, as owners and lessors of such lands, have the same vested right to the use of the water of said river, creek and their tributaries in the irrigation of their said lands as their or their lessors' Indian predecessors in interest had before the alienation of such land.

24. The Court erred in decreeing that the purchaser of such lands, either from the Indian allottee or at such government sales, and his grantees, acquired the title and water rights held by the Indian allottee and is entitled to the same character of water right with equal priority as was held by his Indian grantor.

25. The Court erred in decreeing that the attempt of the United States, when there had been a shortage of water in said river, creek or tributaries, to divert all of the waters therefrom to certain members of the Crow Tribe of Indians and to exclude other members of the Crow Tribe of Indians and their grantees from the use of any of such waters was a usurpation of power and illegal.

26. The Court erred in decreeing that one-half miner's inch of water per acre delivered upon lands irrigable from said river, creek and their tributaries is required and is [439]sufficient for the irrigation thereof.

27. The Court erred in decreeing that each of said answering defendants is entitled to that amount of water for the irrigation of his lands, whether

owned or leased by him, which are irrigable from said river, creek or tributaries, and which were under irrigation when he, or his predecessor in interest, acquired title thereto, or were placed under irrigation with reasonable diligence after he, or his predecessor in interest, acquired title to such land.

WHEREFORE, plaintiff prays that the decree herein be reversed and that the plaintiff be afforded the relief prayed for in its bill of complaint.

R. LEWIS BROWN,
First Assistant United States Attorney for the District of Montana,
KENNETH R. L. SIMMONS,
District Counsel, Department of the Interior, Office of the Solicitor.

Service of the within Assignment of Errors and receipt of a copy is hereby acknowledged this 30th day of November, 1936.

BURKE, COLLINS & HARWOOD,
By E. E. COLLINS,
JOHNSTON, COLEMAN & JAMESON,
By HOWARD W. HANSON,
TANSIL & LAMB,
By F. A. LAMB,
Attorneys for the Defendants.

[Endorsed]: Filed Dec. 1, 1936. [440]

Thereafter, on December 1st, 1936, Petition for Appeal was filed herein, in the words and figures following, to-wit: [441]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

Plaintiff, the United States of America, feeling itself aggrieved by the decree made and entered in this cause on the 20th day of October, 1936, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and said plaintiff prays that its appeal be allowed and that citation issue as provided by law, and that the transcript of record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California.

Dated this 1st day of December, 1936.

R. LEWIS BROWN,
Assistant United States Attorney, District of Montana. [442]
KENNETH R. L. SIMMONS,
District Counsel, Department of Interior, U. S. I. I. S.
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 1, 1936. [443]

Thereafter, on December 1st, 1936, Order Allowing Appeal was signed and filed herein, in the words and figures following, to-wit: [444]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon reading and considering the petition for appeal on file herein, together with the assignment of errors on file herein;

IT IS HEREBY ORDERED that the appeal of the United States of America, plaintiff and appellant, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed.

Dated this 1st day of December, 1936.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Dec. 1, 1936. [445]

Thereafter, on December 1st, 1936, Prayer for Reversal was filed herein, in the words and figures following, to-wit: [446]

[Title of Court and Cause.]

PRAYER FOR REVERSAL.

COMES NOW the plaintiff in the above entitled action and prays that the decree entered herein in the District Court of the United States in and for the District of Montana on the 1st day of December, 1936, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit,

fit and proper in the premises be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 1st day of December, 1936.

R. LEWIS BROWN,
Assistant United States Attorney,
KENNETH R. L. SIMMONS,
District Counsel, Department of Interior, U. S. I. I. S.,
Attorneys for Plaintiff.

[Endorsed]: Filed December 1st, 1936. [447]

Thereafter, on December 1st, 1936, Citation on Appeal was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to-wit: [448]

[Title of Court and Cause.]

CITATION ON APPEAL.

THE PRESIDENT OF THE UNITED STATES TO:

Thomas R. Powers, Edward Schroeder, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Reg. Pearce, Jay L. Henman, Ruth Henman, F. L. Yates, Emma E. Yates, George S. Gibson, Joseph A. Graham, Dominic Stevens, Nickels Dethlefsen, Mary Dethlefsen, C. E. Linthacum, Billie Miller and Robert J. Miller, defendants

Messrs. Burke, Collins and Harwood, Messrs. Johnston, Coleman and Jameson, and Messrs. Tansil and Lamb:

You are hereby notified that in the above entitled cause in equity in the United States District Court in and for the District of Montana an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals on or before thirty days from the date of signing this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done [449] the parties in that behalf.

WITNESS, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, this 1st day of December, 1936.

CHARLES N. PRAY,
Judge.

Service of a copy of the above citation is hereby acknowledged this 2nd day of December, 1936.

BURKE, COLLINS and
HARWOOD,
By: E. E. COLLINS,
JOHNSTON, COLEMAN and
JAMESON,
By: HOWARD W. HANSON,
TANSIL and LAMB,
By: F. A. LAMB,
Attorneys for defendants.

[450]

Thereafter, on December 3rd, 1936, a Praecipe for Transcript of Record on Appeal was duly filed herein, in the words and figures following, to-wit:

[452]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and incorporate in such transcript of record the following papers or exhibits:

I.

The bill of complaint, stipulation dated September 28, 1934 between solicitors of record; joint and several answers of M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Ruth Henman, Billie Miller and Robert J. Miller; joint and several answers of Nickels Dethlefsen and Mary Dethlefsen; joint and separate answer of F. L. Yates and Emma E. Yates; replies of plaintiff to above answers. [453]

II.

Motion to make other parties defendant, of defendants, Nickels Dethlefsen and Mary Dethlefsen; ruling of Court thereon.

III.

Proposed findings of fact and conclusions of law, and objections thereto of all parties; adopted findings of fact and conclusions of law; decree; petition for allowance of appeal; order allowing appeal;

yer for reversal; assignment of errors; and cita-
on on appeal.

IV.

The opinion of the Court after trial of the issues.

V.

The statement of the evidence signed and ap-
oved herein.

VI.

This praecipe with acknowledgment of service
ereon.

VII.

Order dated August 6, 1936 granting extension
lodge statement of evidence; order dated Septem-
r 16, 1936 granting extension to lodge bill of
ceptions.

Said transcript to be prepared and fully certified
you, as required by law and the rules of the
ove entitled Court, and the rules of the United
ates Circuit Court of Appeals for the Ninth
rcuit.

Dated this 1st day of December, 1936.

R. LEWIS BROWN,
Assistant United States Attorney for District of Montana,
KENNETH R. L. SIMMONS,
District Counsel, Department of Interior, U. S. I. I. S.,
Attorneys for plaintiff and appellant. [454]

Service of the foregoing praecipe and receipt of copy admitted this 2nd day of December, 1936.

BURKE, COLLINS & HARWOOD,
By: E. E. COLLINS,
JOHNSTON, COLEMAN & JAMESON,
By: HOWARD W. HANSON,
TANSIL & LAMB,
By: F. A. LAMB,
Attorneys for defendants.

[Endorsed]: Filed December 3, 1936. [455]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 455 pages, numbered consecutively from 1 to 455 inclusive, constitute a full, true and correct transcript of all portions of the record and proceedings called for by praecipe and required to be incorporated in the record on appeal in case No. 2962 United States of America, Plaintiff, vs. Thomas R. Powers, et al., Defendants, as appears from the

nal records and files of said court in my pos-
on as such Clerk; and I do further certify and
n that I have annexed to said transcript and
ded within said pages the original Citation
d in said cause.

further certify that pursuant to the order of
District Court I transmit herewith the follow-
Original Exhibits introduced at the trial of
cause, to-wit:

Plaintiff's Exhibit Two.
Defendants' Dethlefsen's Exhibit One.
Defendants' Exhibit Twelve.
Defendants' Exhibit Eighteen.
Defendants' Exhibit Twenty-nine.
Defendants' Exhibit Thirty-four.
Defendants' Exhibit Forty-two.
Defendants' Exhibit Forty-nine.
Defendants' Exhibit Fifty.
Defendants' Exhibit Fifty-one.
Defendants' Exhibit Fifty-four.

further certify that the costs of said transcript
ecord amount to the sum of $73.75 and have been
e a charge against the United States.

itness my hand and the seal of said Court at
t Falls, Montana, this December 18th, 1936.

eal] C. R. GARLOW,
Clerk. [456]

[Endorsed]: No. 8419. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Thomas R. Powers, Edward Schroeder, M. H. Tschirgi, Bertha Tschirgi, Antler Land Company, a Montana corporation, B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Reg. Pearce, Jay L. Henman, Ruth Henman, F. L. Yates, Emma E. Yates, George S. Gibson, Joseph A. Graham, Dominic Stevens, Nickels Dethlefsen, Mary Dethlefsen, C. E. Linthacum, Billie Miller and Robert J. Miller, Appellees. Transcript of Record. In Two Volumes. Vol. I. Upon Appeal from the District Court of the United States for the District of Montana.

Filed December 22, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

pon Appeal From the District Court of the United States for the District of Montana

Proceedings had in the United States Circuit Court of Appeals for e Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, September 15, 1937

Before GARRECHT, MATHEWS and HANEY, Circuit Judges

No. 8419

Order of submission

Ordered appeal in above cause argued by Mr. R. Lewis Brown, ssistant United States Attorney, and Mr. Kenneth R. L. Simmons, istrict Counsel, U. S. Reclamation Service, counsel for appellant, d by Mr. T. H. Burke, counsel for appellees Tschergi, et al., and bmitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of February 1, 1938

Before GARRECHT, MATHEWS, and HANEY, Circuit Judges

No. 8419

rder directing filing of opinion and filing and recording of decree

By direction of the court, ordered that the typewritten opinion this y rendered by this court in above cause be forthwith filed by the lerk, and that a decree be filed in above cause and recorded in the inutes of this Court in accordance with the opinion rendered.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8419. Feb. 1, 1938

UNITED STATES OF AMERICA, APPELLANT

vs.

THOMAS R. POWERS, EDWARD SCHROEDER, M. H. TSCHIRGI, BERTHA TSCHIRGI, ANTLER LAND COMPANY, A MONTANA CORPORATION, B. B. BELKEN, EDITH G. BELKIN, JUDY WALSH, H. G. CAMPBELL, REB. PEARCE, JAY L. HENMAN, RUTH HENMAN, F. L. YATES, EMMA E. YATES, GEORGE S. GIBSON, JOSEPH A. GRAHAM, DOMINIC STEVENS, NICKELS DETHLEFSEN, MARY DETHLEFSEN, C. E. LINTHACUM, BILLIE MILLER AND ROBERT J. MILLER, APPELLEES

Upon Appeal from the District Court of the United States for the District of Montana

Before GARRECHT, MATHEWS, and HANEY, Circuit Judges

GARRECHT, Circuit Judge.

This suit was brought by the United States to enjoin the defendants, residing within the Crow Indian Reservation in Montana, from diverting any of the waters of Lodge Grass Creek or Little Big Horn River and their tributaries. The bill in equity alleged the setting aside of the Crow Indian Reservation by treaty in 1868, with the intention of the United States to change the Crow Indians from their nomadic habits to those of a pastoral civilized people; that "there was at that time reserved sufficient water of the reservation for the needs of the Crow Tribe or nation of Indians for irrigation, domestic and other purposes"; that all of the lands within the reservation are arid in character and that in order to make the land productive and suitable for agriculture, large quantities of water were required for irrigation "to-wit: one inch to the acre" and that irrigation ditches, canals, etc., were to be constructed for this purpose; that the normal flow of the Lodge Grass Creek and the Little Big Horn River was insufficient to irrigate all of the lands lying within the reservation; that the United States undertook an irrigation project and, in pursuance thereof, caused to be constructed dams, ditches, canals, etc., that these ditches divert the waters of said creek and river and conduct it to lands within the reservation; that there are 23,000 acres susceptible of being cultivated by irrigation if water were available but there is not sufficient water to irrigate more than 15,000 acres of lands lying under such irrigation project; that much of the cost of construction of this project was paid for out of the tribal funds of the Crow Tribe of Indians; that by reason of drought, the flow of these rivers has been diminished. Then follow paragraphs in which are described the lands of the various defendants and the amount of water diverted by each. Thereafter, the plaintiff alleged that the

diversion of waters from said rivers by defendants was wrongful and without consent of the plaintiff, and those entitled to the use of said waters were unlawfully deprived thereof and thereby the plaintiff and its Indian wards were suffering irreparable injury.

The plaintiff asked in its prayer to the bill of complaint that "a permanent injunction issue, enjoining * * * defendants * * * from maintaining or using said dams and ditches * * * and from diverting any of the waters from Lodge Grass Creek or Little Big Horn River and their tributaries * * *." The above is all the relief specifically asked.

Answers were filed which, in general, denied the allegations of the bill, admitted ownership in land within the reservation, admitted the diversion of the waters of the rivers for irrigation purposes, and alleged that the defendants were successors in interest to the original patentees, Indians of the Crow Tribe. The lands had been acquired by purchase, some from the Government at public sale, after the decease of the original allottees and some by purchase from the original patentees. The defendants further alleged that the lands had been allotted to the Indians as irrigable lands and that these lands were purchased as such and with all rights.

Defendants Dethlefsen and Yates each filed an answer and counterclaim and alleged in their respective answers that there were numerous others similarly situated who should be made parties defendant and a motion was made to that effect, which was denied. The plaintiff, in its reply to the answer of the Dethlefsens, denied this allegation. At the trial defendants offered to prove this fact, to which objection was made, and sustained on the ground that the matter had been disposed of by the denial of the motion to make other parties defendant.

The court found from the evidence that defendants Tschirgi were not in possession of, nor had control over the lands described in the bill; that the lands owned or leased by defendants Antler Land Co., the Belkens, Walsh, Campbell, the Henmans, the Millers, the Yates, and the Dethlefsons, were allotments formerly owned by members of the Crow Tribe of Indians and situated within the boundaries of the Crow Indian Reservation in the State of Montana; that the patents issued by the Government to the original allottees, in addition to conveying the described lands, contained the following language: "Together with all rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging."; that there was no reservation of water rights in any of these patents or deeds; that the Indian allottees conveyed to the defendants, or their predecessors, or lessors, by warranty deeds, conveying the premises, "together with all tenements, hereditaments and appurtenances."; that defendants or their predecessors in interest constructed irrigation ditches to convey water from the Little Big Horn River and Lodge Grass Creek to the lands in question and that the plaintiff aided in the construction of some of these ditches and head gates; that "One-half miners' inch of water per acre at the point of delivery on the

irrigated land is sufficient for the proper irrigation of the lands belonging to the defendants and the Crow Indians which are irrigable from the Little Big Horn River and Lodge Grass Creek and their tributaries."; that no classification of lands of deceased Indians was made but that the "allotting agent did classify the lands of living Indians and such portions of the living Indians' lands as had a similar status to the lands of the Antler Land Company affected by this action, were classified as 'irrigable'."; that the Crow Indians gave the Secretary of the Interior permission to construct irrigation ditches with tribal money but did not authorize him to withhold the use of water in respect to any particular land or Indian and he made no rules or regulations for a division of the waters on the reservation among various individual Indians or various tracts of land within the reservation.

The trial court concluded that plaintiff had failed to establish a cause of action against defendants Tschirigi, who were granted a decree of dismissal; also that the Crow Indians, in their treaty with plaintiff in 1868 reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries to an extent necessary to irrigate all lands irrigable from said streams and the right so reserved continued to exist against the United States in favor of the individual Indians and their grantees and their successors in interest; that the waters were reserved to individual Indians and not to the tribe; that under the treaty of 1868 each member of the Crow tribe secured a vested right in the use of sufficient water to irrigate his irrigable land to the extent of forty acres and such vested right has priority as of May 7, 1868, and, subject to the limitation of acreage, each irrigable acre is entitled to the same amount of water as any other acre and in the event of shortage, its pro rata share of the available water, whether the land is under government ditch or not; that the purchaser of such lands, whether from the Indian allottee or at government sales, acquires the title and rights held by the Indian allottees and is entitled to the same character of water right with equal priority as was held by his Indian grantor; that the attempt of plaintiff to make regulations granting certain members of the Crow Tribe of Indians the right to use said waters to the exclusion of other members is a usurpation of power and illegal; that each defendant is entitled to a water right to the extent of one-half miners' inch of water per acre delivered on said land, for the actual acreage that was under irrigation at the time title passed from the Indian allottee by his deed or from the plaintiff at such sales of deceased Indian allotments.

Decree was entered in favor of defendants in accordance with the findings and conclusions set forth above, and plaintiff appeals.

The Crow Indian Reservation was established by a treaty between appellant and the Crow Indians dated May 7, 1868 (15 Stat. 649). There was in the treaty no express reservation of water for irrigation or other purposes. There was, however, an implied reservation. Winters v. United States, 207 U. S. 564, 575. The implied

reservation was to the Indians, not to appellant. Skeem v. United States (C. C. A. 9), 273 F. 93, 95; Conrad Investment Co. v. United States (C. C. A. 9), 161 F. 829, 831; Winters v. United States (C. C. A. 9), 143 F. 740, 745; affirmed in 207 U. S. 564.

By the Act of April 11, 1882, 22 Stat. 42, Congress ratified an agreement between appellant and the Crow Indians whereby the Crows ceded to appellant a portion of the territory originally included in their reservation, in consideration of which it was agreed that appellant would cause the agricultural lands remaining in the reservation to be properly surveyed and divided among the Crows in severalty, in specified proportions, and would issue patents to them respectively, therefor, as soon as the necessary laws were passed by Congress, and that allotments of said lands should be made in the manner specified.

By § 1 of the Act of February 8, 1887, 24 Stat. 388, it was provided:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use * * * the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause such reservation, or any part thereof, to be surveyed * * *, and to allot the lands in said reservation in severalty to any Indian located thereon in [specified] quantities."

Section 5 of the Act provided:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. * * *"

Appellees are patentees, or successors in title of patentees, to whom appellant conveyed allotted lands, in fee, pursuant to the Acts of April 11, 1882, and February 8, 1887, supra. These patents conveyed to the patentees the lands therein described, "together with all rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging."

Section 7 of the Act provided:

"That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appro-

priation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

To render all or any of the lands within the Crow Reservation available for agricultural purposes, the use of water for irrigation was necessary. For such irrigation, the waters of Lodge Grass Creek, Little Big Horn River, and their tributaries were available. Therefore, by § 7, supra, the Secretary of the Interior was authorized to prescribe rules and regulations to secure the just and equal distribution of said water among the Crow Indians, but he was not authorized, by rule, regulation, or otherwise, to deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of said waters.

By § 31 of the Act of March 3, 1891, 26 Stat. 1039, Congress ratified an agreement between appellant and the Crow Indians, whereby the Crows ceded to appellant a further portion of the territory originally included in their reservation, and appellant, in consideration thereof, agreed to pay $946,000, of which $200,000 was to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the irrigation of lands in the reservation, and $75,000 was to be expended under the Secretary's direction for the maintenance and management of a "system of irrigation" provided for in the agreement. The agreement provided "that this cession shall not be construed to deprive without his or her consent any individual Indian of the Crow Tribe of his or her right to any tract of land selected by him or her in conformity with said treaty [of May 7, 1868], or as provided by the agreement approved by Congress April 11, 1882."

Appellant contends that, prior to the Treaty of May 7, 1868, all rights in and to the waters of Lodge Grass Creek, Little Big Horn River, and their tributaries were the property of appellant; that all such rights were by said treaty reserved to appellant and have never been relinquished; that no one else—Indian or white—has ever had the right to divert or use any of said waters without appellant's consent; that no such right was conveyed to or acquired by any patentee of allotted lands in the Crow Reservation; and that, in diverting and using said waters for the irrigation of their lands, appellees are trespassers, and should be enjoined. Appellant's contention is unsupported by authority and is contrary to holdings of this court in Skeem v. United States; Conrad Investment Co. v. United States; and Winters v. United States, supra.

The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.

What right, if any, appellant and appellees, or any of them, may have to divert or use the waters of Lodge Grass Creek, Little Big Horn River, and their tributaries, cannot be determined in this suit. Such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit. In attempting by its decree to determine ap-

rights, in the absence of these necessary parties, the trial erred.

decree is modified by striking therefrom so much thereof rports to grant affirmative relief to defendants, and by incor- ing in said decree an order dismissing without prejudice the erclaim of appellees Yates and Dethlefsen together with an denying plaintiff's application for an injunction and dis- g its bill of complaint, without prejudice. As so modified, ecree is affirmed.

ndorsed:] Opinion. Filed Feb. 1, 1938. Paul P. O'Brien, Clerk.

nited States Circuit Court of Appeals for the Ninth Circuit

No. 8419

UNITED STATES OF AMERICA, APPELLANT

vs.

THOMAS R. POWERS ET AL., APPELLEES

Decree

peal from the District Court of the United States for the t of Montana.

s cause came on to be heard on the Transcript of the Record the District Court of the United States for the District of ana and was duly submitted.

consideration whereof, it is now here ordered, adjudged, and ed by this Court, that the decree of the said District Court is cause be, and hereby is, modified by striking therefrom so thereof as purports to grant affirmative relief to defendants, by incorporating in said decree an order dismissing without dice the counterclaim of appellees Yates and Dethlefsen together an order denying plaintiff's application for an injunction and ssing its bill of complaint, without prejudice, and as so modified id decree be, and hereby is, affirmed.

ndorsed:] Decree. Filed and entered February 1, 1938. Paul Brien, Clerk.

nited States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, March 8, 1938

Before GARRECHT, MATHEWS, and HANEY, Circuit Judges

No. 8419

Order denying petition for rehearing

on consideration thereof, and by direction of the Court, it is ed that the petition of appellant, filed February 28, 1938, and

within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8419

UNITED STATES OF AMERICA, APPELLANT

vs.

THOMAS R. POWERS ET AL., APPELLEES

Order staying issuance of mandate

Upon application of Mr. Carl McFarland, Assistant U. S. Attorney General, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is, stayed to and including June 8, 1938; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated San Francisco, California, May 28, 1938.

[Endorsed:] Order, etc. Filed May 28, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred and ninety-six (596) pages, numbered from and including 1 to and including 596 to be a full, true, and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Robert H. Jackson, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of May, A. D. 1938.

[SEAL] (Sgd.) PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE 16

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 8 1938
CHARLES ELMORE CROPLEY
CLERK

No. 102

In the Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS R. POWERS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
...ions below	1
...iction	2
...tions presented	2
...ty and statutes involved	3
...ment	3
...cation of errors to be urged	10
...ons for granting the writ	11
...rtance of the issues herein	26
...ndix	28

CITATIONS

...es:	
American Falls Reservoir District No. 2 v. *Crandall*, 82 F. (2d) 973	24
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	13, 15
Cherokee Nation v. *Journeycake*, 155 U. S. 196	13
Commonwealth Trust Company v. *Smith*, 266 U. S. 152	24
Conrad Inv. Co. v. *United States*, 161 Fed. 829	14
Gritts v. *Fisher*, 224 U. S. 640	15
Heckman v. *United States*, 224 U. S. 413	15
Lone Wolf v. *Hitchcock*, 187 U. S. 553	15
Sloom v. *United States*, 273 Fed. 93	14
The Cherokee Trust Funds, 117 U. S. 288	13
Vallia v. *Fortuna Estates*, 240 Fed. 256	24
Winters v. *United States*, 207 U. S. 564	12, 13, 14
...ty and Statutes:	
Treaty of May 7, 1868, 15 Stat. 649	28
Act of April 11, 1882, c. 74, 22 Stat. 42	30
Act of February 8, 1887, c. 119, 24 Stat. 388	31
Act of March 3, 1891, c. 543, 26 Stat. 1040	37
Act of March 1, 1899, c. 324, 30 Stat. 947	19
Act of May 31, 1900, c. 598, 31 Stat. 247	19
Act of April 27, 1904, c. 1674, 33 Stat. 357	19

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS R. POWERS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on February 1, 1938, affirming the decree of the United States District Court for the District of Montana, as modified.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 586–591) is reported in 94 F. (2d) 783. The opinion of the trial court (R. 253–277) is reported in 16 F. Supp. 155.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on February 1, 1938 (R. 591). Petitioner filed a petition for rehearing which was denied on March 8, 1938 (R. 591–592). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether waters, impliedly reserved by the Treaty of May 7, 1868, for the purpose of irrigating the lands of the Crow Indian Reservation, were reserved to the individual Indians of the tribe rather than to the tribe for the benefit of its people as is the case with Indian property generally—even though the lands were admittedly and expressly held in tribal ownership under the treaty, and nothing in the treaty implied otherwise as to waters.

2. Whether all the owners of lands within an Indian reservation are indispensable parties to a suit by the United States to enjoin certain landowners within the reservation from unlawfully diverting waters reserved for the irrigation of tribal lands—where (1) the defendants are wholly without right to divert waters from the stream without the consent of the Secretary of the Interior; (2) the diversion by the defendants interferes with the operation of a reclamation project constructed and

maintained on the reservation for the benefit of the Indian tribe by the Secretary of the Interior pursuant to specific Acts of Congress; and (3) the absence of other landowners can neither harm the defendants (who may advance every pertinent defense to the suit, and under any decree could be subject to no liability to other landowners) nor prejudice such other landowners (who would not be subject to the decree sought, and whose supply of water would not be diminished if it were granted).

TREATY AND STATUTES INVOLVED

The pertinent parts of the Treaty of May 7, 1868 (15 Stat. 649), creating the Crow Indian Reservation; of the Act of April 11, 1882 (22 Stat. 42), providing for the allotment of Crow Reservation land; of the Act of February 8, 1887 (24 Stat. 388), commonly referred to as the General Allotment Act; and of the Act of March 3, 1891 (26 Stat. 1040), authorizing the construction of the Crow Irrigation Project system and making funds available therefor, are set forth in the Appendix, *infra*.

STATEMENT

In June 1934, the United States instituted this suit in the District Court for the District of Montana, Billings Division, against certain owners of land within the Crow Indian Reservation to enjoin them from diverting the waters of the Little Big Horn River, Lodge Grass Creek, and their tributaries, within the Crow Indian Reservation

(R. 2–29, 40). Both courts below held that th Government was not entitled to the relief sough (R. 317–319, 591). The facts essential to an un derstanding of the case, are as follows:

1. *Treaty of 1868.*—The Treaty of May 7, 186 *infra,* setting aside certain lands for the Crow In dian Reservation, provided that any member o the tribe, being the head of a family, who desire to commence farming "shall have the privilege t select * * * a tract of land within said res ervation, not exceeding 320 acres in extent, whic tract * * * shall cease to be held in common but the same may be occupied and held in the exclu sive possession of the person selecting it, and of hi family, so long as he or they may continue to culti vate it." Members of the tribe, not heads o families, were given the right to select a tract of 8 acres. Those who commenced farming were en titled to receive "seed and agricultural imple ments" for the first four years, as well as instruc tions from a Government farmer. The treaty wa silent as to any rights to use the waters borderin on or flowing through the reservation.

2. *The Reclamation Project.*—More than 63,00 acres of land within the reservation were suitabl for farming if waters could be made available fo their irrigation (R. 6–7, 46, 106, 136, 353, 357). Ac cordingly, before 1885, the Government commence the construction of irrigation works to divert th waters of the Little Big Horn River and Lodg Grass Creek, which flowed through the reservation

for use upon the lands (R. 9–10, 327–333, 335, 337, 343).

The General Allotment Act of 1887 (24 Stat. 388), provided—

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

A few years later the United States and the Crow Tribe entered into an agreement whereby certain lands within the reservation were ceded to the Government, and in consideration therefor the Secretary of the Interior was authorized to expend $275,000 in the construction, maintenance and management of a comprehensive irrigation system. Act of March 3, 1891 (c. 543, 26 Stat. 1040). Thereafter, additional funds were made available for this purpose, out of "the annuity money due or to become due said Indians" (30 Stat. 947; 31 Stat. 247) or from funds due in consideration of further land cessions (33 Stat. 357). Under such authorization, from 1893 to 1915, six ditches were constructed at a cost of almost two million dollars with a sufficient carrying capacity to irrigate more than 23,000 acres within the reach of the project (R. 334, 335, 337–341, 349, 350–353, 357, 380).

3. *Allotments to Defendants' Predecessors.*—Commencing in the year 1901, allotments in severalty of various sized tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek within the reservation were made to the defendants' predecessors pursuant to the Act of April 11, 1882 (22 Stat. 42) and the Act of February 8, 1887 (24 Stat. 388). These allotments finally culminated in the issuance of fee simple patents issued as provided in the Act of May 8, 1906 (34 Stat. 182; R. 325, 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). The defendants have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at Government sales of deceased allottees' lands (R. 308). None of the deeds or patents under which they claim title contain any express provision as to water rights but merely purport to convey the land "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" (R. 460, 308). None of defendants' lands are within the area irrigable by the Government project described above (R. 15, 17–26, 55–57, 114, 144) but, from the time that patents were issued,[1] have been irrigated by

[1] The trial court found that "the Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896." No allotments were made, however, to members of the Peters family until 1901 to 1907, and patents were not issued until 1918 to 1923 (R. 154–155, 172–173, 460–468).

water diverted from the Little Big Horn River and Lodge Grass Creek and their tributaries through privately owned ditches (R. 308–309, 357–360).

4. *Present Suit Filed.*—By reason of drought during the years 1931 to 1934 and the diversion of waters upstream from the Government project by the defendants there was not sufficient water available to irrigate successfully the 8,000 acres being farmed under the Government project (R. 403, 433, 502–503) and in 1934 conditions became so acute that serious crop losses were suffered—in many cases the crops being totally abandoned (R. 357, 396–398, 403, 407, 410, 415, 418, 422, 423, 425, 427, 429–433, 434, 502, 503). Accordingly this suit was filed to enjoin the defendants from diverting the waters of the Little Big Horn and Lodge Grass Creek and thus to make available all the waters of those streams necessary for the irrigation of lands within the Government project (R. 26–28).

In their answers, the defendants alleged that as successors to Indian allottees they were entitled to divert as much water as they might need for irrigating their lands and "for stock, domestic and any other beneficial purposes," or one-half of one miner's inch of water per acre at the point of delivery (R. 64, 70, 75, 81, 86, 87, 90, 92, 95, 97, 120, 150, 157). As a further defense, they also alleged that other persons were diverting waters upstream from the Government project under rights similar to theirs and "that there cannot be any complete adjudication as to water rights in said river,

creek, and their tributaries without joining all of said persons as parties defendant herein" (R. 116-117, 146–147). A motion to require the plaintiff to make these persons parties defendant (R. 163–165) was denied (R. 221), as was an offer to prove the extent of their diversions (R. 439).

The trial court concluded, merely from the fact that lumber for a headgate on a ditch built by a predecessor of one of the defendants "was furnished by the irrigating outfit at Crow Agency" (R. 477), that the appropriation of water by these defendants was "known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs" (R. 309–310), although the evidence at the trial was that none of the defendants or their predecessors had been authorized by the Secretary of the Interior or any of his subordinates to construct ditches or divert waters from either stream (R. 358–360, 500).

5. *The Decree of the Trial Court.*—The trial court concluded as a matter of law that by the Treaty of 1868, there was reserved, for the benefit of each individual Indian, "and not for the Crow Tribe of Indians * * * sufficient water to irrigate his irrigable land to the extent of forty acres" the right to which became vested upon the issuance of patents with a priority as of May 7, 1868 (R. 313–314). The court also concluded (R. 315):

> The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right

> to use the waters of said river, creek, and their tributaries to the exclusion of other members is an usurpation of power and illegal.

Accordingly, although the bill required no affirmative determination of the amount of water the respective parties were entitled to receive, a decree was entered dismissing it and awarding "each of said answering defendants" one-half miner's inch of water per acre at the point of delivery, and decreeing that "in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its prorata share of the available water therefrom, whether such land is under a government ditch or not" (R. 317–319).

6. *The Decree of the Court Below.*—Upon appeal by the Government, the court below also held that the waters were reserved by the treaty for the benefit of the individual Indians and not for the tribe and that therefore the Secretary of the Interior was not authorized (R. 590)—

> to deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of said waters.
>
> * * * * *
>
> The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.

The court then held, however, that the trial court erred insofar as it attempted to determine the

rights of the defendants because "such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit" (R. 590). Accordingly a decree was entered, which reads as follows (R. 591):

> The decree [of the trial court] is modified by striking therefrom so much thereof as purports to grant affirmative relief to defendants, and by incorporating in said decree an order dismissing without prejudice the counterclaim of appellees Yates and Dethlefsen together with an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice. As so modified, the decree is affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the waters of the Little Big Horn River and Lodge Grass Creek, and their tributaries, were reserved by the Treaty of May 7, 1868, for the benefit of individual Indians and not for the common benefit of the Crow Tribe.

2. In failing to hold that the United States, as guardian of the Crow Tribe and its members, may control and has exercised control over the waters within the Crow Reservation needful for the irrigation of the land therein.

3. In holding that the Secretary of the Interior was not authorized to prevent any allottee or

patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee from diverting the waters of the Little Big Horn River and Lodge Grass Creek.

4. In failing to enjoin the defendants, whose lands are not included in an irrigation project constructed, maintained and managed by the Secretary of the Interior, from diverting waters necessary for the irrigation of lands under the system.

5. In holding that all of the owners of lands within the reservation are necessary parties to this suit.

6. In holding that "The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case."

7. In modifying the decree of the trial court by incorporating therein "an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice" and in affirming the decree of the trial court as modified.

8. In failing to reverse the decree of the trial court and to order an injunction to issue as prayed for in the bill of complaint.

REASONS FOR GRANTING THE WRIT

In affirming the trial court's holding that the Treaty of May 7, 1868, creating the Crow Indian Reservation impliedly reserved waters for irrigating reservation lands but that it reserved them to the individual Indians of the tribe and not to the Indian tribe for the benefit of its people, the court

below passed upon an important question of Federal law which has not been but should be settled by this Court. The decision, moreover, appears to be erroneous in view of previous decisions of this Court.

I

Waters Reserved by the Treaty Are Tribal Property

When land was set apart for the Crow Indian Reservation by the Treaty of May 7, 1868, *infra*, no mention was made of waters within the borders of the reservation. It has long been settled, however, that under such a treaty the waters bordering on or flowing through the reservation are impliedly reserved by the Indians in a sufficient amount to supply their needs, including the irrigation of their lands. *Winters* v. *United States*, 207 U. S. 564, 567–577. The problem here presented by the decisions below is whether this implied reservation was for the benefit of the tribe or for the individual members thereof. It is the position of the Government that the waters were reserved for the benefit of the tribe in common and not for the benefit of any individual Indian.[3]

It is clearly established that, prior to some division or allotment in severalty, Indian lands and property are held by the tribe in common owner-

[3] The Government is not stressing any claim made below of ownership of these waters by the United States, except as guardian of the Indians and their tribal property, since whether the fee is in the Indians or the United States is immaterial with reference to the relief sought.

ship. *The Cherokee Trust Funds,* 117 U. S. 288, 308; *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294. In the *Hitchcock* case, this Court said (p. 307):

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, * * *.
>
> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

As stated with reference to the property of the Cherokee tribe in *The Cherokee Trust Funds* case, *supra* (p. 309):

> All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

No reason appears why, in the case of water, the established principle that tribal property is owned in common should be departed from and a novel doctrine laid down that waters are reserved for individual Indians. Previous cases establish no authority for such a departure from the usual rule. On the contrary, while the point was not expressly decided in *Winters* v. *United States,* 207 U. S. 564, it is clear that when the Court there decided that the waters were impliedly reserved for the Indians it meant the Indian tribes and not the individual Indians, since, as is apparent

from the bill of complaint in that case (pp. 565-567), the United States was proceeding on behalf of the several Indian tribes and not on behalf of individual Indians. Nor do *Skeem* v. *United States*, 273 Fed. 93 (C. C. A. 9th), and *Conrad Inv. Co.* v. *United States*, 161 Fed. 829 (C. C. A. 9th), cited by the Circuit Court of Appeals (R. 589, 590), support its position, since those cases did not purport to decide specifically whether the waters impliedly reserved were reserved to the Indian tribes involved or to individual Indians. Like the *Winters* case, the *Conrad* case was a suit by the United States on behalf of an Indian tribe. The *Skeem* case, in which the United States brought suit on behalf of individual Indians, involved the interpretation of treaty provisions expressly reserving water to individual Indians occupying certain lands. The Court construed the provisions in the light of the doctrine of the *Winters* case.

The decision of the trial court and that of the court below are both based upon their view that the right to the use of waters was reserved to the individual Indians in severalty. Upon that basis those courts have concluded that when irrigable land was allotted to ~~the~~ AN Indians, somehow the several water rights became appurtenant to 40 acres of the land and passed, as an appurtenance, to any purchaser of an allotment. Manifestly, for the reasons shown, the courts erred with respect to the basis of their decisions.

THE DECREE BELOW CAN NOT BE SUSTAINED ON OTHER GROUNDS

While the court below bases its decision in favor of the defendants on the grounds set forth in Point I, *supra,* some of the language in its opinion and in that of the trial court makes it proper to point out that the decision that the plaintiff is not entitled to an injunction can not be sustained on the ground that the allotment Acts, the subsequent allotments, or the patents gave the defendants a vested right to use the waters. On the contrary, as will be shown, Congress by its subsequent enactments has given the Secretary of the Interior full control of the waters here involved, at least as far as they are needed for the Crow Irrigation Project.

a. *Congress has not granted individual interests in the use of waters of the reservation; instead, it has placed control of them under the Secretary of the Interior.*—It is elementary that the United States has plenary control of tribal property. The full measure of that control is shown in such cases as *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Gritts* v. *Fisher,* 224 U. S. 640, and *Heckman* v. *United States,* 224 U. S. 413, 444. It goes to the extent that the United States may sell unallotted lands for the benefit of the tribe contrary to the provisions of a treaty with the tribe. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566.

Under the doctrine of these cases Congress could, if it saw fit, dispose of the lands in severalty but

retain the waters for the tribe in common. The legislation subsequent to the treaty indicates that the Government has, in this instance, retained control of the water and has made provision for its use for the benefit of the tribe.

Neither the Act of April 11, 1882 (22 Stat. 42), nor the Act of February 8, 1887, which applies to Indian tribes generally, nor the allotments made thereunder, nor the subsequent patents purport to convey any water rights (R. 308, 325, 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). Indeed, Section 7 of the General Allotment Act of February 8, 1887 (24 Stat. 388), provides—

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

This section is a part of a general Act applying to numerous tribes and varying conditions. It does not relate solely to the circumstances of the Crow Reservation. Obviously, it is based upon the plenary power of the United States to manage and control the common tribal property for the com-

mon benefit of the tribe and, in the exercise of that power with respect to the utilization of the common water supply of any reservation required for irrigation, imposes upon the Secretary of the Interior the duty and authority to use the power for the common benefit of the resident Indians.

Question was raised below as to the extent of that control. In the first place it is to be noted that Congress was concerned with securing just and equal distribution of water among the Indians residing upon any such reservations. The accomplishment of that purpose under the diverse circumstances to which that general Act applies would require a great measure of control. Indians with land lying close to a stream might procure water with comparative ease while those who lived some distance away, particularly those of limited resources, could not. Some Indians dwell on irrigable land, others on land not susceptible to irrigation. Some might occupy lands which do not need irrigation. Presumably these facts were known to Congress and considered when the Act was passed. The power conferred must have been intended to be broad enough to accomplish its stated purpose under the evident circumstances. A power as narrowly limited as that which defendants say this section confers would be utterly inadequate. Nothing short of power to control and direct irrigation projects could procure a just distribution.

It is also obvious that an irrigation project can not be operated effectively without control of the waters necessary to the system. It is the Government's contention that this Act recognizes that the United States had full power to control the distribution of water for irrigation and directs the Secretary of the Interior to exercise that power for the United States on behalf of the Indians.

This interpretation is supported by subsequent legislative interpretations in the Acts of Congress appropriating money for the construction, maintenance, and operation of an irrigation system on the Crow Reservation, discussed, *infra,* p. 19, the first one of which was the Act of March 3, 1891, passed four years subsequent to this Act.

Therefore, it is submitted that the courts below erred in assuming that the Secretary's power was limited to prescribing "rules and regulations," and in holding that the defendants might divert waters in defiance of his control.

b. *The United States as guardian of the tribe has reserved sufficient waters for the irrigation of lands under the system of irrigation authorized by Congress.*—From the cases previously cited regarding plenary control, *supra,* it is apparent that even against the wishes of the tribe or its members, Congress would have power to dedicate waters of the reservation to the irrigation of those lands which the Secretary of the Interior should find to be irrigable. A fortiori it could do so with the consent

of the Indian tribe for whose benefit the waters were reserved. It is submitted Congress has clearly done so with respect to the waters in litigation.

If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, statutes passed in pursuance of an agreement with the Crow Tribe have reserved the waters in question for the lands under the system of irrigation therein provided.

More specifically, the Act of March 3, 1891 (26 Stat. 1039), authorized the construction of the Crow Irrigation Project system and made funds available therefor. Acts of March 1, 1899 (30 Stat. 947), May 31, 1900 (31 Stat. 247), and April 27, 1904 (33 Stat. 357), made further funds available for the system. By Section 31 of the Act of March 3, 1891, Congress appropriated funds "to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper * * *." The money was appropriated to be expended under his direction "for the maintenance and management of the system of irrigation provided for in this agreement [with the Crow Indians]."

Fairly construed, this Act must be regarded as (1) vesting in the Secretary of the Interior, in ad-

dition to the authority already vested in him by Section 7 of the general Act of February 8, 1887, authority to determine the lands feasible of irrigation by means of the irrigation system, since obviously such authority is necessary in order for him to be able to determine the location and extent of the ditches and canals to be constructed; (2) vesting in the Secretary of the Interior authority to take such of the waters within the Crow Indian Reservation as may be found needful for the irrigation of lands determined by him to be feasibly irrigable; and (3) dedicating waters so taken to the needs of the lands lying under the irrigation system.

Otherwise, the absurd result would obtain, as it does under the decisions of the courts below, that Congress has authorized the Secretary to construct an irrigation system but withheld from him authority over waters essential to render it beneficial and useful. The "maintenance and management of the system of irrigation provided for" was not possible without the water necessary for its operation. Since provision was made for the system and the waters necessary for the irrigation of lands under it were reserved prior to any allotments and patents to the defendants or their predecessors, their rights, if any, are subordinate to those of the system.

c. *The allotments and patents to defendants or their predecessors gave them no vested rights to water.*—Congress has not in any legislation pur-

ported to confer a right upon the individual Indians nor purported to fasten upon all irrigable lands of the Reservation, as appurtenant thereto, an equal amount, acre per acre, of the available water of the reservation, nor given authority to others to grant allottees rights which would entitle them to interfere with the control of the Secretary of the Interior over reservation waters and certainly not over those necessary for the irrigation system.

The Acts of April 11, 1882 (22 Stat. 42), February 8, 1887 (24 Stat. 388), and March 3, 1891 (26 Stat. 1040), which contained provisions looking toward allotments, did not provide that allotments should carry water rights. No reason appears why the bare allotments of irrigable lands under such allotment Acts should create water rights in the allottee when the allotments are silent with respect thereto.

Accordingly, since these Acts did not provide that allotments when made should carry water rights, and since the allotments were silent as to water rights, the patents alone remain to be examined. They also are silent as to water rights. The terminology "together with all rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" would pass only such water rights as were already appurtenant to the land. Such language alone could not create, as appurtenances, rights not previously appurtenant to the land. As previously shown, Congress had never made them appurtenant to the land. Accordingly,

no right to water passed to an Indian allottee in severalty by the patent, and none could be transferred to a white purchaser.

It is submitted, therefore, that *all* the waters necessary for the use of the reservation had been reserved under the control of the Secretary of the Interior by the Act of 1887; that, irrespective of such reservation, sufficient water to irrigate lands within the system had been so reserved prior to the making of allotments and the issuance of patents to defendants' predecessors; and that neither the allotments nor patents have subtracted from the control of the Secretary of the Interior over the waters of the reservation or, at least, of those waters reserved for the irrigation system. Therefore any water rights which defendants may have are subject to the paramount needs of the irrigation system. The plaintiff showed that there ~~was~~ WERE not sufficient waters to irrigate the lands in use under the system (R. 403, 433, 502-503), and that it and the Indians were being irreparably injured (R. 357, 396-398, 403, 407, 410, 415, 418, 422, 423, 425, 427, 429-433, 434, 502 503). Therefore the injunction should have been granted.

II

Other Landowners in the Reservation Were Not Indispensable Parties

Wholly disregarding the theory of the bill of complaint, which sought merely a determination

whether the United States as guardian of the tribe may control waters needed for the irrigation of the lands of the reservation, the District Court acceded to the request of the defendants for a determination entitling them to a pro rata per acre share of the water and treated the suit as one for an adjudication of water rights (R. 316–317). The Circuit Court of Appeals treated the suit in the same manner and directed the dismissal, without prejudice, of the bill and the counterclaim, indicating that affirmative relief could not be granted because of nonjoinder of all landowners within the reservation, whom it regarded as necessary parties (R. 590–591). But it is the position of the Government that the suit is not one for an adjudication of water rights and that the bill should not have been dismissed for defect of parties, whatever action may have been appropriate with respect to the counterclaims.

The action was for an injunction, not for an adjudication of water rights. The bill of complaint required the District Court and the Circuit Court of Appeals to determine (a) whether the United States as guardian of the Indians might control, to the exclusion of the defendants, all waters needed for the lands within the project, and (b) whether the limited supply of water was needed for such lands. An affirmative answer to these questions should have resulted in the granting of the injunctive relief sought. It was error for the courts below

to depart from the theory of the bill of complaint and treat the suit as the usual water suit requiring determination of amounts of water to which the defendants, as between all users, might be entitled.

It may be true that all the landowners would be necessary parties to the action on the cross bills, but, since the bill of complaint does not require adjudication of water rights, all landowners within the reservation are neither necessary nor indispensable parties in order to grant the relief sought by the Government. The court below has cited no authorities to support its position.

It is true that cases may be found, in which rights in water are the subject of controversy and which are not suits for the adjudication of a stream, in which absent parties are held necessary or even indispensable parties to the suit. Cf. *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, 160–161; *Veitia* v. *Fortuna Estates* (C. C. A. 1st), 240 Fed. 256, 261; *American Falls Reservoir District No. 2* v. *Crandall* (C. C. A. 9th), 82 F. (2d) 973, 978. But in these cases the decree sought, if granted, would have operated directly to deprive the absent parties of an amount of water to which they were entitled or the rights of the parties to the suit would be adversely affected by the absence of such parties.

In the present case, however—where (1) landowners within the reservation other than the defendants will not be affected by the operation of the

decree sought, since the decree will not serve to cut down their supply of water, (2) the defendants will not be adversely affected in establishing their rights by the absence of other landowners, and (3) if the decree goes against them, they will be subjected to no liability to the other landowners by reason thereof—such landowners are neither necessary nor indispensable parties to the suit. The fact that a decision in favor of the plaintiff will serve as a precedent in suits against other landowners interfering with the control of the Secretary of the Interior will not in itself make those landowners indispensable parties.

Clearly, with reference to the issues raised in the bill of complaint, the conclusion of the court below that "such a determination would directly and materially affect all owners of land within the reservation" (R. 590) was erroneous—unless it was referring to the cross bills which, of course, do not affect the Government's position here.

Moreover, if all landowners within the reservation are necessary parties, then logically, all parties using the stream in question off the reservation, would also be necessary parties. For example, all water users along Pass Creek, a stream arising in Wyoming and emptying in the Little Big Horn River in Montana (R. 379) should be joined. But the United States, where its bill of complaint was never framed for an adjudication of water rights, may not be required to assume the burden of bring-

ing into the suit a multplicity of parties or of maintaining an interstate suit.

IMPORTANCE OF THE ISSUES HEREIN

Approximately $2,000,000.00 of tribal and public funds has been expended on the Crow Irrigation Project (R. 352). In addition, more than $50,000,000.00 has been invested in irrigation projects constructed and maintained by the Government on other Indian reservations in the arid States. Thousands of acres of lands are susceptible of irrigation on these reservations, while the total available water supply is wholly inadequate to irrigate all of them. Moreover, under the rulings of the courts below each acre is entitled to a pro rata share of the available waters, while as a matter of obvious fact thousands of additional acres of reservation lands cannot be economically irrigated. For example, in the present case it is manifest that the distribution of the limited supply of waters for such a vast acreage on the pro rata basis sanctioned by the courts below would result in an utter waste of water since none of the lands would receive enough waters to justify their cultivation.

Furthermore, if the decrees of the courts below are permitted to stand, a multiplicity of suits with a multiplicity of parties will inevitably follow between the United States and the thousands of allottees and patentees and their successors owning lands irrigated by Indian waters. All practicable

ontrol over these private diverters by the Secre-
ary of the Interior will have been removed.

The magnitude of the interests involved and the
ature of the rights asserted, therefore, fully war-
ant a review by this Court of the questions in-
olved so that correct principles may be applied in
his and future cases.

Wherefore, it is respectfully submitted that this
etition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE 1938.

APPENDIX

The pertinent articles of the Treaty of May 7, 1868, 15 Stat. 649, are:

> ARTICLE II. The United States agrees that the following district of country, to wit: * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.
>
> ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within

said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow Land Book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

The pertinent parts of the Act of April 11, 1882, c. 74, 22 Stat. 42, are—

> First. That the Government of the United States cause the agricultural lands remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress. Allotments in severalty of said surveyed lands shall be made as follows:
>
> To each head of a family not more than one quarter-section, with an additional quantity of grazing land not exceeding one quarter-section.
>
> To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.
>
> To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and
>
> To each other person under eighteen years, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.
>
> All allotments to be made with the advice of our agent, or such other person as the Secretary of the Interior may designate for that purpose upon our selection, heads of families selecting for their minor children, and the agent making the allotment for each orphan child. The title to be acquired by us, and by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court,

nor subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction, which shall be incorporated in each patent.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement.

The Act of February 8, 1887, c. 119 (24 Stat. 388) is in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is

advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected

by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set part and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it

shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom

such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occuping any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among

the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

The pertinent part of the Act of March 3, 1891, 543, 26 Stat. 1040, is—

That in consideration of the cession of territory herein made by us as individual Indians and heads of families of the Crow tribe to the Government of the United States, the said Government of the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, hereby agrees to pay the sum of nine hundred and forty-six thousand dollars lawful money of the United States, in the manner hereinafter described:

First. That of the above-named sum there is hereby appropriated and set apart two hundred thousand dollars to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper: *Provided,* That not to exceed fifty thousand dollars shall be expended annually in performing this work: *And provided further,* That the superintendent in charge of said works shall, in the employment of laborers, be required to give preference to such Indians of the Crow tribe as are competent and willing to work at the average wages paid to common laborers for the same kind of work,

and the labor so employed shall be paid
cash.

That the sum of seventy-five thousand dol
lars is hereby appropriated and set
as an irrigating fund, to be expended
the direction of the Secretary of the Int
for the maintenance and management
system of irrigation provided for in
agreement.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaty and statutes involved	4
Statement	5
Specifications of errors to be urged	12
Summary of Argument	13
Argument:	
I. Waters reserved by the treaty are tribal property	15
II. The use of the waters has not become appurtenant to allotted lands	18
a. Acting within its plenary powers with reference to tribal property, Congress has directed the allotment of lands in severalty but retained control of the waters	20
b. The control of the use of waters of the Indian reservations has been placed in the Secretary of the Interior	25
c. Any rights which the allottees got by reason of their allotments were subject to the prior reservation of waters for the use of lands under the Government's irrigation system	28
III. Other landowners in the reservation were not indispensable parties	31
Conclusion	35
Appendix	38

CITATIONS

Cases:	
American Falls Reservoir Dist. No. 2 v. *Crandall*, 82 F. (2d) 973	34
Beck v. *Bono*, 59 Wash. 479	33
Boquillas Cattle Co. v. *Curtis*, 213 U. S. 339	22
British-American Co. v. *Board*, 299 U. S. 159	21
Broder v. *Water Co.*, 101 U. S. 274	21
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	16, 21
Cherokee Nation v. *Journeycake*, 155 U. S. 196	16
Commonwealth Trust Company v. *Smith*, 266 U. S. 152	33
Conrad Inv. Co. v. *United States*, 161 Fed. 829	17
Custer Con. Mines Co. v. *City of Helena*, 52 Mont. 35	25
Grills v. *Fisher*, 224 U. S. 640	20

Cases—Continued. Page

Gutierres v. *Albuquerque Land Co.*, 188 U. S. 545 22
Hays v. *Buzard et al.*, 31 Mont. 74 25
Heckman v. *United States*, 224 U. S. 413 20
Lone Wolf v. *Hitchcock*, 187 U. S. 553 21
Metzler v. *Ames Realty Co.*, 61 Mont. 152 22
Nebraska v. *Wyoming*, 295 U. S. 40 30
Oklahoma v. *Texas*, 258 U. S. 574 ..... 24, 25
Sander v. *Wilson*, 34 Wash. 659 33
Skeem v. *United States*, 273 Fed. 93 17
Smith v. *Deniff*, 24 Mont. 20 ..... 21, 25
The Cherokee Trust Funds, 117 U. S. 288 16
United States v. *Conrad Inv. Co.*, 156 Fed. 123 33
United States v. *Hibner*, 27 F. (2d) 909 18
United States v. *Oregon*, 295 U. S. 1 ..... 24, 25
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690 .. 21
United States v. *Winans*, 198 U. S. 371 25
Veitia v. *Fortuna Estates*, 240 Fed. 256 34
Washington State Sugar Co. v. *Sheppard*, 186 Fed. 233 35
Winters v. *United States*, 207 U. S. 564 ..... 15, 18

Treaty and Statutes:

Treaty of May 7, 1868, 15 Stat. 649 ..... 4, 5, 14, 38
Act of April 11, 1882, c. 74, 22 Stat. 42 ..... 4, 7, 21, 39
Act of February 8, 1887, c. 119, 24 Stat. 388 .... 4, 6, 7, 25, 28, 41
Act of March 3, 1891, c. 543, 26 Stat. 1040 ..... 4, 7, 27, 28, 46
Act of March 1, 1899, c. 324, 30 Stat. 947 ..... 7, 29
Act of May 31, 1900, c. 598, 31 Stat. 247 ..... 7, 29
Act of April 27, 1904, c. 1674, 33 Stat. 357 ..... 7, 29
Act of May 8, 1906, c. 2348, 34 Stat. 182 8

Miscellaneous:

2 Kinney, Irrigation and Water Rights (2 ed., 1912), § § 1009, 1011 25

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 102

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS R. POWERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 586–591) is reported in 94 F. (2d) 783. The opinion of the trial court (R. 253–277) is reported in 16 F. Supp. 155.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on February 1, 1938 (R. 591). Petitioner filed a petition for rehearing which was denied on March 8, 1938 (R. 591–592). The petition for a writ of certiorari was filed on June 8, 1938, and was granted on October 10, 1938. The jurisdiction of this Court is con-

ferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether waters, impliedly reserved by the Treaty of May 7, 1868, for the purpose of irrigating the lands of the Crow Indian Reservation, were reserved to the individual Indians of the tribe rather than to the tribe for the benefit of its people as is the case with Indian property generally—even though the lands were admittedly and expressly held in tribal ownership under the treaty, and nothing in the treaty implied otherwise as to waters.

2.[1] Whether allotments of 160 acres each of agricultural land to individual Indians of the Crow Tribe which were silent as to water rights created water rights appurtenant to 40 acres of such land, when no pertinent Act of Congress or treaty with the Crow Tribe contained provisions for transferring rights with respect to the use of waters upon the Crow Reservation, and when by Section 7 of the Act of February 8, 1887 (24 Stat. 388), the Secretary of the Interior was "authorized to prescribe such rules and regulations as he may deem

[1] Questions 2, 3, and 4, although they were anticipated and discussed in the petition for certiorari in view of certain language in the opinion, were thought to be not directly raised by the decision of the courts below. Accordingly, they were not stated in the petition as separate questions, but were discussed in the petition on pages 15–22. In order that the points may be more completely summarized, they are here stated as additional questions.

necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *."

3. Whether the respondents may divert from the control of the Secretary of the Interior, for use on lands outside the project, any waters which are necessary for the irrigation of lands served by an irrigation project constructed, pursuant to the Act of March 3, 1891, with the consent of the tribe, before any allotment of lands to or appropriation of waters by the predecessors of any of the respondents, and having at the time of construction ample carrying capacity to irrigate the lands under the project.

4. Whether the issuance of fee patents to land upon an Indian reservation which transfer land not under Government irrigation "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" affixes water rights as appurtenances to the land involved even though (a) such rights have been reserved previously by the Government and (b) under the law of Montana patents for land in the public domain do not carry with them any right to the use of water for irrigation purposes unless that right has previously been affixed to the land by lawful appropriation and use of water thereon.

5. Whether all the owners of lands within an Indian reservation are indispensable parties to a suit by the United States to enjoin certain landowners within the reservation from unlawfully di-

verting waters reserved for the irrigation of tribal lands—where (1) the respondents are wholly without right to divert waters from the stream without the consent of the Secretary of the Interior; (2) the diversion by the respondents interferes with the operation of a reclamation project constructed and maintained on the reservation for the benefit of the Indian tribe by the Secretary of the Interior pursuant to specific Acts of Congress; and (3) the absence of other landowners can neither harm the respondents (who may advance every pertinent defense to the suit, and under any decree could be subject to no liability to other landowners) nor prejudice such other landowners (who would not be subject to the decree sought, and whose supply of water would not be diminished if it were granted).

TREATY AND STATUTES INVOLVED

The pertinent parts of the Treaty of May 7, 1868 (15 Stat. 649), creating the Crow Indian Reservation; of the Act of April 11, 1882 (22 Stat. 42), providing for the allotment of Crow Reservation land; of the Act of February 8, 1887 (24 Stat. 388), commonly referred to as the General Allotment Act; and of the Act of March 3, 1891 (26 Stat. 1040), authorizing the construction of the Crow Irrigation Project system and making funds available therefor, are set forth in the Appendix, *infra*.

STATEMENT

In June 1934 the United States instituted this suit in the District Court for the District of Montana, Billings Division, against certain owners of land within the Crow Indian Reservation to enjoin them from diverting the waters of the Little Big Horn River, Lodge Grass Creek, and their tributaries, within the Crow Indian Reservation (R. 2-29, 40). Both courts below held that the Government was not entitled to the relief sought (R. 317–319, 591). The facts essential to an understanding of the case are as follows:

1. *Treaty of 1868.*—The Treaty of May 7, 1868, *infra*, setting aside certain lands for the Crow Indian Reservation, provided that any member of the tribe, being the head of a family, who desired to commence farming "shall have the privilege to select * * * a tract of land within said reservation, not exceeding 320 acres in extent, which tract * * * shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." Members of the tribe, not heads of families, were given the right to select a tract of 80 acres. Those who commenced farming were entitled to receive "seed and agricultural implements" for the first four years, as well as instructions from a Government farmer. The treaty was

silent as to any rights to use the waters bordering on or flowing through the reservation.

2. *The Reclamation Project.*—More than 63,000 acres of land within the reservation were suitable for farming if waters could be made available for their irrigation (R. 6–7, 46, 106, 136, 353, 357). Accordingly, before 1885, the Government commenced the construction of irrigation works to divert the waters of the Little Big Horn River and Lodge Grass Creek, which flowed through the reservation, for use upon the lands (R. 9–10, 327–333, 335, 337, 343).

The General Allotment Act of 1887 (24 Stat. 388) provided:

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

A few years later the United States and the Crow Tribe entered into an agreement whereby certain lands within the reservation were ceded to the Government, and in consideration therefor the Secretary of the Interior was authorized to expend $275,000 in the construction, maintenance, and management of a comprehensive irrigaton system (Act

of March 3, 1891, c. 543, 26 Stat. 1040). Thereafter, additional funds were made available for this purpose out of "annuity money due or to become due said Indians" (30 Stat. 947; 31 Stat. 247) or from funds due in consideration of further land cessions (33 Stat. 357). Under such authorization, from 1893 to 1915, repairs were made to the Reno ditch which was built in 1885 and five additional ditches were constructed at a cost of almost two million dollars with a sufficient carrying capacity to irrigate more than 23,000 acres within the reach of the project (R. 334, 335, 337–341, 349, 350–353, 357, 360). Four of these, including the Reno ditch, with a carrying capacity of 600 cubic feet per second (sufficient under the court's theory of the needs for each acre of the land to irrigate 48,000 acres; under the Government's theory 24,000 acres), were constructed before 1895 (R. 10–11, 333–337, 341–348), which was prior to any allotments to the predecessors of respondents (R. 59–62, 62–63, 68–69, 74–75, 79–80, 85–86, 89–90, 94–95, 154–155, 561).

3. *Allotments to Respondents' Predecessors.*—The Act of April 11, 1882 (22 Stat. 42), provided for the allotment to each head of a family in the Crow Tribe of not to exceed 160 acres of agricultural land and an equal quantity of grazing land. Others than heads of families were to receive a smaller acreage. Neither this Act nor the Act of February 8, 1887 (24 Stat. 388), contained provisions authorizing conveyance of a water right.

Commencing in 1901, allotments in severalty of tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek within the reservation were made to the respondents' Indian predecessors pursuant to these Acts. These lands so allotted were not designated as irrigable at the time of their allotment (R. 311). The allotments were made following a letter of instruction by the Commissioner to the Special Allotting Agent which contained the statement: "As to the quantity of irrigable land to be given each Indian, it is thought that 40 acres will be an ample quantity" (R. 452). Only three tracts out of all the allotments made were subsequently classified as irrigable (R. 311). These allotments finally culminated, subsequent to 1906, in the issuance of fee simple patents as provided in the Act of May 8, 1906 (34 Stat. 182; R. 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). The respondents have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at Government sales of deceased allottees' lands (R. 308). None of the deeds or patents under which they claim title contain any express provision as to water rights but merely purports to convey the land "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" (R. 308, 460). None of respondents' land is within the area irrigable by the Government project described above (R. 15, 17–26, 55–57, 114, 144), but,

from the time that patents were issued,[2] have been privately irrigated by water diverted from the Little Big Horn River and Lodge Grass Creek and their tributaries through privately owned ditches (R. 308–309, 357–360).

4. *Present Suit Filed.*—By reason of drought during the years 1931 to 1934 and the diversion by the respondents of waters upstream from the Government project, there was not sufficient water available to irrigate successfully the 8,000 acres being farmed under the Government project (R. 391–394, 399–403, 418, 433) and in 1934 conditions became so acute that serious crop losses were suffered—in many cases the crops being totally abandoned (R. 391, 398, 407, 410, 415, 417, 423, 425, 427, 430, 432). Accordingly this suit was filed to enjoin the respondents from diverting the waters of the Little Big Horn and Lodge Grass Creek and thus to make available all the waters of those streams necessary for the irrigation of lands within the Government project (R. 26–28).

In their answers the respondents alleged that as successors to Indian allottees they were entitled to divert as much water as they might need for irrigating their lands and "for stock, domestic and

[2] The trial court found that "the Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896." No allotments were made, however, to members of the Peters family until 1901 to 1907, and patents were not issued until 1918 to 1923 (R. 154–155, 172–173, 460–468).

any other beneficial purposes," or one-half of one miner's inch of water per acre at the point of delivery (R. 64, 70, 75, 81, 86, 87, 90, 92, 95, 97, 120, 150, 157). As a further defense, respondents Yates and Dethlefsen, in their separate answers, also alleged that other persons were diverting waters upstream from the Government project under rights similar to theirs and "that there cannot be any complete adjudication as to water rights in said river, creek, and their tributaries without joining all of said persons as parties defendant herein" (R. 116–117, 146–147). A motion by respondents Dethlefsen to require the Government to make these persons parties defendant (R. 163–165) was denied (R. 221), as was an offer to prove the extent of their diversions (R. 439).

The trial court concluded, merely from the fact that lumber for a headgate on a ditch built by a predecessor of one of the respondents "was furnished by the irrigating outfit at Crow Agency" (R. 477), that ~~the~~ THIS appropriation of water ~~by these respondents~~ was "known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs" (R. 309–310), although the evidence at the trial was that none of the respondents or their predecessors had been authorized by the Secretary of the Interior or any of his subordinates to construct ditches or divert waters from either stream (R. 358–360, 500).

5. *The Decree of the Trial Court.*—The trial court concluded as a matter of law that by the

Treaty of 1868 there was reserved, for the benefit of each individual Indian, "and not for the Crow Tribe of Indians * * * sufficient water to irrigate his irrigable land to the extent of forty acres", the right to which became vested upon the issuance of patents with a priority as of May 7, 1868 (R. 313–314). The court also concluded (R. 315):

> The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right to use the waters of said river, creek, and their tributaries to the exclusion of other members is an usurpation of power and illegal.

Although the bill required no affirmative determination of the amount of water the respective parties were entitled to receive, a decree was entered dismissing it and awarding "each of said answering defendants" one-half miner's inch of water per acre at the point of delivery, and decreeing that "in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its prorata share of the available water therefrom, whether such land is under a government ditch or not" (R. 317–319).

6. *The Decree of the Court Below.*—Upon appeal by the Government the court below held that:

> The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.

The court then held, however, that the trial court erred insofar as it attempted to determine the rights of the respondents because "such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit" (R. 590). Accordingly a decree was entered, which reads as follows (R. 591):

> The decree [of the trial court] is modified by striking therefrom so much thereof as purports to grant affirmative relief to defendants, and by incorporating in said decree an order dismissing without prejudice the counterclaim of appellees Yates and Dethlefsen together with an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice. As so modified, the decree is affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the waters of the Little Big Horn River and Lodge Grass Creek, and their tributaries, were reserved by the Treaty of May 7, 1868, for the benefit of individual Indians and not for the common benefit of the Crow Tribe.

2. In failing to hold that the United States, as guardian of the Crow Tribe and its members, may control and has exercised control over the waters within the Crow Reservation needful for the irrigation of the land therein.

3. In holding that the Secretary of the Interior was not authorized to prevent any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee from diverting the waters of the Little Big Horn River and Lodge Grass Creek.

4. In failing to enjoin the defendants, whose lands are not included in an irrigation project constructed, maintained and managed by the Secretary of the Interior, from diverting waters necessary for the irrigation of lands under the system.

5. In holding that all of the owners of lands within the reservation are necessary parties to this suit.

6. In holding that "The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case."

7. In modifying the decree of the trial court by incorporating therein "an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice" and in affirming the decree of the trial court as modified.

8. In failing to reverse the decree of the trial court and to order an injunction to issue as prayed for in the bill of complaint.

SUMMARY OF ARGUMENT

I

Prior to allotment, lands expressly reserved for an Indian reservation are held by the tribe in com-

mon ownership. The logical view is that the use of the waters impliedly reserved is held in the same ownership. This Court has indicated that such is the law.

II

Since, prior to the allotments, the use of the water was not affixed to the land as an appurtenance thereof, but ceased upon the Indian's death, the courts below must rely on the allotments and patents as the basis of their decisions. But neither the allotments nor the patents support the decisions below. The United States has plenary control over tribal property. It may allot lands, reserving for the tribe the use of waters. It has done so. The applicable allotment Acts neither expressly nor impliedly authorize the allotting agents to affix the use of water as an appurtenance to the land. Nor do the allotments or patents purport to do so. On the contrary the United States has placed control of tribal waters in the Secretary of the Interior by the Act of February 8, 1887, the Act of March 3, 1891, and subsequent irrigation Acts. The irrigation system constructed by the Secretary under the authority of an Act of Congress prior to allotments of any of the lands of the respondents served to dedicate and reserve waters necessary for the system. The rights, if any, of allottees, patentees and their successors, are subordinate to this prior reservation. The petitioner showed that there was not sufficient water to irri-

gate the lands in use under the system. The respondents admit that they are taking these waters by private diversion and without the consent of the Secretary of the Interior.

III

The suit brought by the Government was for an injunction against the wrongful diversion of waters from its control and not for an adjudication of water rights. An owner is under no obligation to join all who trespass on his rights to the use of waters. Since neither the respondents nor other landowners of the reservation will be adversely affected by the non-joinder of the latter, they are not necessary parties to the suit.

ARGUMENT

I

WATERS RESERVED BY THE TREATY ARE TRIBAL PROPERTY

When land was set apart for the Crow Indian Reservation by the Treaty of May 7, 1868, *infra,* no mention was made of waters within the borders of the reservation. It has long been settled, however, that under such a treaty the waters bordering on or flowing through the reservation are impliedly reserved for the Indians in a sufficient amount to supply their needs, including the irrigation of their lands. *Winters* v. *United States,* 207 U. S. 564, 576–577. The problem presented by the decisions below is whether this implied reservation was for

the benefit of the tribe or for its individual members. It is the position of the Government that the waters were reserved for the benefit of the tribe in common and not for the benefit of any individual Indian.[3]

It is clearly established that, prior to some division or allotment in severalty, Indian lands and property are held by the tribe in common ownership. *The Cherokee Trust Funds,* 117 U. S. 288, 308; *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294. In the *Hitchcock* case, this Court said (p. 307):

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, * * *.
>
> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

As stated with reference to the property of the Cherokee tribe in *The Cherokee Trust Funds* case, *supra* (p. 309):

> All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

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[3] The Government is not stressing any claim made below of ownership of these waters by the United States, except as guardian of the Indians and their tribal property, since whether the fee is in the Indians or the United States is immaterial with reference to the relief sought.

No reason appears why, in the case of water, the established principle that tribal property is owned in common should be departed from and the unnatural implication made that the waters are reserved for the individual Indians. If anything, water is less susceptible of individual ownership than land. Surely, in 1868 the Crows enjoyed it in common as they did land. Previous cases establish no authority for such a departure from the usual rule. On the contrary, while the point was not expressly decided in *Winters* v. *United States,* 207 U. S. 564, it is clear that when the Court there decided that the waters were impliedly reserved for the Indians it meant the Indian tribes and not the individual Indians, since, as is apparent from the bill of complaint in that case (pp. 565–567), the United States was proceeding on behalf of the several Indian tribes and not on behalf of individual Indians. Nor do *Skeem* v. *United States,* 273 Fed. 93 (C. C. A. 9th), and *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (C. C. A. 9th), cited by the Circuit Court of Appeals (R. 589, 590), support the contrary position of the court. Those cases did not purport to decide specifically whether the waters impliedly reserved were reserved to the Indian tribes involved or to individual Indians. Like the *Winters* case, the *Conrad* case was a suit by the United States on behalf of an Indian tribe. The *Skeem* case, in which the United States brought suit on behalf of individual Indians, involved the interpreta-

tion of treaty provisions expressly reserving waters to individual Indians occupying certain lands. The court construed the provisions in the light of the doctrine of the *Winters* case, that in the absence of an express provision there is an implied reservation. Cases like *United States* v. *Hibner*, 27 F. (2d) 909 (Idaho), relied upon by the trial court lend no support to the court's position for the same reason.

The decision of the trial court and that of the court below are both based upon their view that the right to the use of waters was reserved to the individual Indians in severalty. Upon that basis those courts have concluded that, when irrigable land was allotted to an Indian, somehow the several water right became appurtenant to 40 acres of the land and passed, as an appurtenance, to any purchaser of an allotment. Manifestly, for the reasons shown, the courts erred with respect to the basis of their decisions.

II

THE USE OF THE WATERS HAS NOT BECOME APPURTENANT TO ALLOTTED LANDS

Even if the initial assumption of the courts below that the water rights were reserved to the individual Indians were sound, it would not sustain the claims of the present respondents since they are not Indians. The District Court stated that prior to allotments any individual Indian's

right to land and water ceased upon his death (R. 264). Therefore to establish any rights in the respondents who were white purchasers of Indian allotments (in most cases, as respondents point out in their answers, of allotments of deceased Indians, R. 64, 70, 76, 81, 86, 91, 95) it would be necessary to go beyond the mere basic assumption upon which the opinions in the courts below seem to rest, and take the view that either the allotments or the patents from the Government affixed to the land, as an appurtenance, the right to the use of water. Indeed, it is clear that both courts below rely on the allotments and patents as the real basis of the rights of the respondents (R. 267, 307–308, 589). In some manner, not clear from the opinions, they reach the conclusion that upon allotment of tribal lands, or at least upon issuance of the Government patents thereto, the right to the use of water, which they suggest belonged to the individual Indian and would perish at his death, became affixed to the land as an appurtenance, and that the purchaser of an unrestricted patent got a right to take reservation water, free from any control by the Secretary of the Interior.

Taking the view of the Government that the use of the water as well as the land was in the tribe, the respondents might advance the theory that the use of the water was appurtenant to the land upon the creation of the reservation and at all times thereafter and would pass upon allotment.

Such a theory would be wholly unworkable in practice. For instance, there were over sixty-three thousand acres of land in this reservation which could be irrigated if waters were available (R. 6-7, 46, 106, 136, 353, 357). There were additional thousands of acres of land of other descriptions on the reservation (R. 6, 45). It must be remembered that water may be appurtenant to land for mining and other purposes as well as for irrigation. 2 Kinney, Irrigation and Water Rights (2nd ed. 1912) § 1012. The water supply, shown to be inadequate to irrigate eight thousand acres at the time of the trial (R. 357), would be practically valueless to all if the owners of even sixty-three thousand acres should have equal interests therein. The sensible view seems to be to treat tribal waters like the waters of the public domain. Until some steps have been taken by the Government, or under its direction, to affix to the lands the right to the use of waters, it remains tribal property to be used for various tribal purposes. Besides, this was an implied reservation for the Indians. It is difficult to believe that an Indian tribe, in 1868, when it knew little or nothing about irrigation and when the streams were chiefly useful to its members for fishing and stock-watering purposes, would conceive of tying the waters of a mountain stream to land as the white man does.

a. *Acting within its plenary powers with reference to tribal property, Congress has directed the*

allotment of lands in severalty but retained control of the waters.—It is elementary that the United States has plenary control of tribal property. The full measure of that control is shown in such cases as *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Gritts* v. *Fisher,* 224 U. S. 640; and *Heckman* v. *United States,* 224 U. S. 413, 444. It goes to the extent that the United States may sell unalloted lands for the benefit of the tribe contrary to the provisions of a treaty with the tribe. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566.

Congress may, under this doctrine, allot lands in severalty yet sever the mineral rights and thus "create a distinct estate" which is "tribal land." *British-American Co.* v. *Board,* 299 U. S. 159, 164–165. Surely if Congress may do this it may, if it sees fit, allot in severalty tribal land without affixing the use of water thereto.

In examining the statutes to see whether Congress has made provision for affixing water rights to the lands, regard must be paid to the settled policy of Congress to treat lands and waters of the public domain separately, to the fact that in an appropriation State such as Montana a conveyance of lands will not carry with it the use of waters, and that the right to the use of waters for irrigation is ordinarily acquired by complying with the laws of the State. *Broder* v. *Water Co.,* 101 U. S. 274, 276; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 704; *Smith* v. *Deniff,* 24 Mont.

20, 60 Pac. 398, 50 L. R. A. 737, reversing 23 Mont. 65, 57 Pac. 557; *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 Pac. 702; cf. *Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545, 553; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344–345.

There seems to be no more reason in the case of Indian lands than in the case of other lands why there should be a presumption that an allotment of land which is silent as to waters carries with it the right to the use of waters. Consequently, before an Act which authorized the allotments of Indian tribal land in severalty is to be held to fasten the right to use of water upon the lands as an appurtenance at the time of the allotment, there must be some language in the Act indicating such an intention. No language has been found in the applicable statutes regarding the allocation of Indian lands which so indicates. The pertinent allotment statutes are the Act of April 11, 1882 (22 Stat. 42), and the Act of February 8, 1887 (24 Stat. 388). Neither contains any provisions concerning allotment of the use of water. Not only are there no affirmative provisions calling for affixing water rights to the land or transferring the water rights, but Section 7 of the Act of February 8, 1887, clearly retains dominion over the waters in the Federal Government for the benefit of the Indians, for it provides:

> That in cases where the use of water for irrigation is necessary to render the lands

> within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

It is difficult to see how the allotments made under that Act, which were silent as to water rights, fasten the use of water, as an appurtenance, upon forty irrigable acres out of each 160 of agricultural land. They were made under instructions, likewise silent as to water rights, to allot to each head of a family 160 acres of agricultural land. Only three 40-acre tracts out of the entire acreage to be allotted were classified as irrigable, and these were so classified subsequent to their allotment. The idea that the right to the use of water attached to forty acres out of each 160 acres of the agricultural land apparently arose from the fact that Special Allotting Agent Rankin had been told in a letter from the Indian Commissioner that the construction of the largest Government work had proceeded to a point which would enable the agent to determine what lands could be irrigated from it, and that it was thought that forty acres of irrigable land would be sufficient for each Indian (R. 452). Such instructions are clearly insufficient to give the allotment when made the effect of transferring water rights.

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Nor do the patents fasten any water rights upon the lands. They are silent as to water rights. The terminology "together with all rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" contained in the patents and upon which both courts below relied (R. 269, 308, 589), would pass only such water rights as were already appurtenant to the land. Such language alone would not create, as an appurtenance, any right to the use of water not previously appurtenant to the land. As previously shown, Congress had never made any such right appurtenant to the land. The cases cited by the trial court (R. 269–270) are not applicable. Typical is *United States* v. *Oregon,* 295 U. S. 1. That case holds that a conveyance by the Government of uplands bordering a non-navigable lake will not vest in the State title to adjacent land under water, although the state law so provides, where there is no basis for implying an intent on the part of the Government to convey title to the State. The excerpt quoted by the court (R. 269–270) is dictum, the Court stating in the immediately following sentence (p. 28): "But no such question is presented here, for there is no basis for implying any intention to convey title to the State." The case of *Oklahoma* v. *Texas,* 258 U. S. 574, cited and quoted in this excerpt, holds that a conveyance by the United States of Indian tribal lands bordering a stream will be governed by state law, "if its inten-

tion be not otherwise shown" (p. 595). These cases determine nothing here, irrespective of the intent of the Government with respect to the several patents involved. Under the law of Montana a grant of land with its appurtenances carries no water right unless water, in some way, has previously been made appurtenant to the land. *Smith* v. *Deniff*, 24 Mont. 20, 60 Pac. 398, 50 L. R. A. 737, reversing 23 Mont. 65, 57 Pac. 557; *Hays* v. *Buzard et al.*, 31 Mont. 74, 82, 77 Pac. 423; *Custer Con. Mines Co.* v. *City of Helena*, 52 Mont. 35, 43, 156 Pac. 1095; 2 *Kinney, Irrigation and Water Rights* (2d ed. 1912) §§ 1009, 1011.

Furthermore, the United States has shown an intention to reserve the waters. Therefore, according to *United States* v. *Oregon* and *Oklahoma* v. *Texas* (*supra*), and related cases, the patents would not pass any water rights. See also *United States* v. *Winans*, 198 U. S. 371, in which this Court held that patents from the Government absolute in form, which normally would carry fishing rights along the Columbia River shore, did not do so when the fishing rights had been previously reserved to Yakima Indians.

b. *The control of the use of waters of the Indian reservations has been placed in the Secretary of the Interior.*—Section 7 of the Allotment Act of February 8, 1887, quoted *supra*, p. 22, places control of the use of the water on the reservation in the Secretary of the Interior. This section is a

part of a general Act applying to numerous tribes and varying conditions. It does not relate solely to the circumstances of the Crow Reservation. Obviously, it is based upon the plenary power of the United States to manage and control the common tribal property for the common benefit of the tribe and, in the exercise of that power with respect to the utilization of the common water supply of any reservation acquired for irrigation, imposes upon the Secretary of the Interior the duty and authority to use the power for the common benefit of the resident Indians.

Question was raised below as to the extent of that control. First it must be borne in mind that Indians of the various tribes were inexpert agriculturalists and unacquainted with the complexities of irrigation farming. To allow each Indian to take out waters where he pleased, as respondents argue they are entitled to do, would have created an intolerable situation if each had exercised the right. In the second place it is to be noted that Congress was concerned with securing just and equal distribution of water among the Indians residing upon each of the reservations subject to the act. On many of them, as on this one, the amount of irrigable land was large and the supply of water limited. The accomplishment of that purpose under the diverse circumstances to which that general act applies would require a great measure of control. Indians with land lying close to a stream

might procure water with comparative ease while those who lived some distance away, particularly those of limited resources, could not. Some Indians dwell on irrigable lands, others on land not susceptible to irrigation. Some might occupy lands which do not need irrigation. Presumably these facts were known to Congress and considered when the act was passed as the first sentence of Section 7 indicates. The power conferred must have been intended to be broad enough to accomplish its stated purpose under these evident diverse circumstances. A power as narrowly limited as that which respondents say this section confers would be utterly inadequate. Nothing short of power to control and direct irrigation projects could procure a just distribution. It is also obvious that an irrigation project can not be operated effectively without control of the waters necessary to the system. It is the Government's contention that this act recognizes that the United States had full power to control the distribution of water for irrigation and directs the Secretary of the Interior to exercise that power for the United States on behalf of the Indians.

This interpretation is supported by subsequent legislative interpretations in the acts of Congress appropriating money for the construction, maintenance, and operation of an irrigation system on the Crow Reservation, discussed, *infra*, pp. 28–30. The first one of these, the Act of March 3, 1891, gave

to the Secretary the broadest of powers in the selection of the valleys to be irrigated and in the management of the system of irrigation there provided.

Therefore, it is submitted that the courts below erred in assuming that the Secretary's power was limited to prescribing "rules and regulations," and in holding that the respondents might divert waters in defiance of his control.

c. *Any rights which the allottees got by reason of their allotments were subject to the prior reservation of waters for the use of lands under the Government's irrigation system.*—From the cases previously cited regarding plenary control, *supra* (pp. 20–21), it is apparent that even against the wishes of the tribe or its members, Congress would have power to dedicate waters of the reservation to the irrigation of those lands which the Secretary of the Interior should find to be irrigable. *A fortiori* it could do so with the consent of the Indian tribe for whose benefit the waters were reserved. It is submitted Congress has clearly done so with respect to the waters in litigation.

If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, the Act of March 3, 1891 (26 Stat. 1040) passed in pursuance of an agreement with the Crow Tribe and the construction of irrigation works under authority of that statute have set apart and reserved the waters in question for the lands under the system of irriga-

tion so established. In no event would such reserved waters pass to allottees of lands which were not under this system.

More specifically, that Act authorized the construction of the Crow Irrigation Project system and made funds available therefor.[4] By Section 31 Congress appropriated funds "to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper * * *." The money was appropriated to be expended under his direction "for the maintenance and management of the system of irrigation provided for in this agreement [with the Crow Indians]."

Fairly construed, this Act must be regarded as (1) vesting in the Secretary of the Interior, in addition to the authority already vested in him by Section 7 of the general Act of February 8, 1887, authority to determine the lands feasible of irrigation by means of the irrigation system (and obviously such authority is necessary to enable him to determine the location and extent of the ditches and canals to be constructed); (2) vesting in the Secretary of the Interior authority to take such of the

[4] Acts of March 1, 1899 (30 Stat. 947), May 31, 1900 (31 Stat. 247), and April 27, 1904 (33 Stat. 357), made further funds available for the system.

waters within the Crow Indian Reservation as may be found needful for the irrigation of the lands so determined to be feasibly irrigable; and (3) dedicating waters so taken to the needs of the lands lying under the irrigation system.

Otherwise, the absurd result would obtain, as it does under the decisions of the courts below, that Congress has authorized the Secretary to construct an irrigation system but withheld from him authority to take the waters essential to render it useful. A carefully constructed ditch with no water to flow through it is an obstruction to farming instead of a benefit. The "maintenance and management of the system of irrigation provided for" would be impossible without the water necessary for its operation. Nor was advance notice of the amount to be appropriated required as is the case when the Reclamation Service reserves or appropriates the unreserved waters of the public domain for an irrigation project (*Nebraska* v. *Wyoming*, 295 U. S. 40, 43). The waters in question were tribal waters and the Government might reserve or appropriate, as it did, an indefinite amount, that is, such amount as might be necessary for the contemplated system, without filing notice anywhere as to the limit of the amount of waters to be taken. Prior to 1894 and before any allotments to respondents, the greater portion of the system had been completed and was in operation with a carrying capacity of 600 cubic feet per second (R. 10–11,

333–337, 341–348), or 24,000 inches (R. 434, 489, 492), which under the court's finding would be sufficient to irrigate 48,000 acres (R. 310), and under the Government's contention 24,000 acres (R. 7, 435). There was not sufficient water available in 1934 for irrigating the 8,000 acres being farmed under the project (R. 433).

Since provision was made for the system and the waters necessary for the irrigation of lands under it were reserved prior to any allotments and patents to the respondents or their predecessors, their rights, if any, are subordinate to those of the system.

III

OTHER LANDOWNERS IN THE RESERVATION WERE NOT INDISPENSABLE PARTIES

Wholly disregarding the theory of the bill of complaint, which sought merely a determination whether the United States may control all waters needed for the irrigation of the lands of the reservation, and if not all, then those dedicated and reserved to its irrigation system prior to the making of allotments to the respondents' predecessors, the District Court acceded to the request of the respondents for a determination entitling them to a pro rata per acre share of the water and treated the suit as one for an adjudication of water rights (R. 316–317). The Circuit Court of Appeals treated the suit in the same manner and directed the dismissal, without prejudice, of the bill and the

counterclaim, indicating that affirmative relief could not be granted because of nonjoinder of all landowners within the reservation, whom it regarded as necessary parties (R. 590–591). But it is the position of the Government that the suit is not one for an adjudication of water rights and that the bill should not have been dismissed for defect of parties, whatever action may have been appropriate with respect to the counterclaim.

The suit was for an injunction, not for an adjudication of water rights. The bill of complaint required the District Court and the Circuit Court of Appeals to determine (a) whether the United States as guardian of the Indians might control, to the exclusion of the respondents, all waters needed for the lands within the project, and (b) whether the limited supply of water was needed for such lands. An affirmative answer to these questions should have resulted in the granting of the injunctive relief sought, since the respondents were taking water without the consent of the Government officials (R. 26, 357–360) as one of the respondents admitted (R. 500). It was error for the courts below to depart from the theory of the bill of complaint and treat the suit as the usual water suit requiring determination of amounts of water to which the respondents, as between all users, might be entitled.

It may be true that all the landowners would be necessary parties to the suit on the cross bills, but, since the bill of complaint does not require adjudi-

cation of water rights, all landowners within the reservation are neither necessary nor indispensable parties in order to grant the relief sought by the Government. As said by the Court in *United States* v. *Conrad Inv. Co.*, 156 Fed. 123 (at page 132):

> Another question presented is whether complainant can maintain this proceeding without at the same time making all other appropriators and users of water from the same stream parties to the suit, that the correlative rights of all the parties to the use of such water may be settled and adjusted. I am of the opinion that it can. Any invasion of the government's right to the use of the water from said stream would give it cause for suit. And this would be so whether the shortage to the government was caused by one or several parties. All would be trespassers, and the government could sue some or all jointly, or any one of them severally, as it might feel disposed.

See also *Sander* v. *Wilson*, 34 Washington 659, 76 Pac. 280; *Beck* v. *Bono*, 59 Washington 479, 110 Pac. 13. The court below has cited no authorities to support its position.

It is true that cases may be found in which rights in water are subject of controversy and which are not suits for the adjudication of a stream, in which absent parties are held necessary or even indispensable parties to the suit. Cf. *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, 160–

161; *Veitia* v. *Fortuna Estates*, 240 Fed. 256, 261 (C. C. A. 1st); *American Falls Reservoir Dist. No. 2* v. *Crandall*, 82 F. (2d) 973, 978 (C. C. A. 9th). But in these cases the decree sought, if granted, would have operated directly to deprive the absent parties of an amount of water to which they were entitled or the rights of the parties to the suit would be adversely affected by the absence of such parties.

In the present case, however—where (1) landowners within the reservation other than the respondents will not be affected by the operation of the decree sought, since the decree will not serve to cut down their supply of water; (2) the respondents will not be adversely affected in establishing their rights by the absence of other landowners, and (3) if the decree goes against them they will be subjected to no liability to the other landowners by reason thereof—such landowners are neither necessary nor indispensable parties to the suit. The fact that a decision in favor of the petitioner will serve as a precedent in suits against other landowners interfering with the control of the Secretary of the Interior will not in itself make those landowners indispensable parties.

Clearly, with reference to the issues raised in the bill of complaint, the conclusion of the court below that "such a determination would directly and materially affect all owners of lands within the reservation" (R. 590) was erroneous—unless it was referring to the cross bills, which, of course, do not affect the Government's position here.

Moreover, if all landowners within the reservation are necessary parties, then logically all parties using the stream in question off the reservation would also be necessary parties. For example, all water users along Pass Creek, a stream arising in Wyoming and emptying in the Little Big Horn River in Montana (R. 379) should be joined. "Under such conditions, it would be impossible for one of the claimants to force all of the others into any tribunal in a single suit." *Washington State Sugar Co.* v. *Sheppard,* 186 Fed. 233, 235. But the United States, where its bill of complaint was never framed for an adjudication of water rights, may not be required to assume the burden of bringing into the suit a multiplicity of parties or of maintaining an interstate suit.

CONCLUSION

Congress early saw that economical use of a limited supply of water on Indian reservations, if the Indians were to get a just and equal distribution of it, required the construction of irrigation projects and the control by the Federal Government of the waters of the reservation. The Government has already expended over $50,000,000 of tribal and public funds in the construction and maintenance of irrigation projects on Indian reservations, approximately $2,000,000 having been expended on the Crow Irrigation Project (R. 352, 354). Control by the Federal Government is now more neces-

sary than ever, since much of the land of the reservation has fallen into the hands of the whites as a result of the era when unrestricted patents were freely given to Indians.

With the vastly heavier demands of the white irrigators in contrast with the simple wants of the Indians, it is obvious that the distribution of the limited supply of water for vast acreages on a pro rata basis as sanctioned by the court below would result in an utter waste of water. None of the lands would receive enough water to justify their cultivation, particularly if allottees, patentees, and their successors were to be permitted to divert water from the rivers wherever they please, as respondents have done, with consequent greater losses by evaporation, seepage, and other unavoidable irrigation losses.

The testimony in the present case shows that the policy of the Government to secure a just and equal distribution of the water among the Indians has been thwarted by the respondents and that crops have been abandoned by reason thereof (R. 410, 415). If the decrees below are permitted to stand, like action on the part of the thousands of other allottees, patentees, and their successors will deprive the Secretary of the Interior of all control of the waters of the reservation and of the irrigation projects.

Since the waters of the Crow Reservation were reserved for the benefit of the tribe; since the

United States has reserved control and supervision of such waters for the benefit of the Indians, and has placed the exercise of that control in the Secretary of the Interior, and in addition has reserved from allotment or appropriation for other lands sufficient waters for the irrigation of lands under its governmentally constructed irrigation projects; and since all other landowners on the reservation are not necessary parties to this suit for an injunction against trespasses, respondents should be enjoined from taking such waters from the control of the Secretary of the Interior.

Wherefore, it is respectfully submitted that the decree of the court below should be reversed and the cause remanded with instructions to grant the injunction prayed for by the Government.

ROBERT H. JACKSON,
Solicitor General.

CARL MCFARLAND,
Assistant Attorney General.

C. W. LEAPHART,
Attorney, Department of Justice.

OCTOBER 1938.

APPENDIX

The pertinent articles of the Treaty of May 7, 1868, 15 Stat. 649, are:

ARTICLE II. The United States agrees that the following district of country, to wit: * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract,

when so selected, certified, and recorded in the "Land Book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow Land Book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

The pertinent parts of the Act of April 11, 1882, c. 74, 22 Stat. 42, are—

First. That the Government of the United States cause the agricultural lands remain-

ing in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively, therefor, so soon as the necesary laws are passed by Congress. Allotments in severalty of said surveyed lands shall be made as follows:

To each head of a family not more than one quarter-section, with an additional quantity of grazing land not exceeding one quarter-section.

To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and

To each other person under eighteen years, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

All allotments to be made with the advice of our agent, or such other person as the Secretary of the Interior may designate for that purpose upon our selection, heads of families selecting for their minor children, and the agent making the allotment for each orphan child. The title to be acquired by us, and by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court, nor subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restric-

tion, which shall be incorporated in each patent.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement.

The Act of February 8, 1887, c. 119 (24 Stat. 388), is in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivi-

sion of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for

the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,

on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

The pertinent part of the Act of March 3, 1891, c. 543, 26 Stat. 1040, is—

That in consideration of the cession of territory herein made by us as individual Indians and heads of families of the Crow tribe

to the Government of the United States, the said Government of the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, hereby agrees to pay the sum of nine hundred and forty-six thousand dollars lawful money of the United States, in the manner hereinafter described:

First. That of the above-named sum there is hereby appropriated and set apart two hundred thousand dollars to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper: *Provided,* That not to exceed fifty thousand dollars shall be expended annually in performing this work: *And provided further,* That the superintendent in charge of said works shall, in the employment of laborers, be required to give preference to such Indians of the Crow tribe as are competent and willing to work at the average wages paid to common laborers for the same kind of work, and the labor so employed shall be paid in cash.

That the sum of seventy-five thousand dollars is hereby appropriated and set apart as an irrigating fund, to be expended under the direction of the Secretary of the Interior for the maintenance and management of the system of irrigation provided for in this agreement.

U. S. GOVERNMENT PRINTING OFFICE: 1939

In the

[redacted]

[redacted]

UNITED [redacted]

vs.

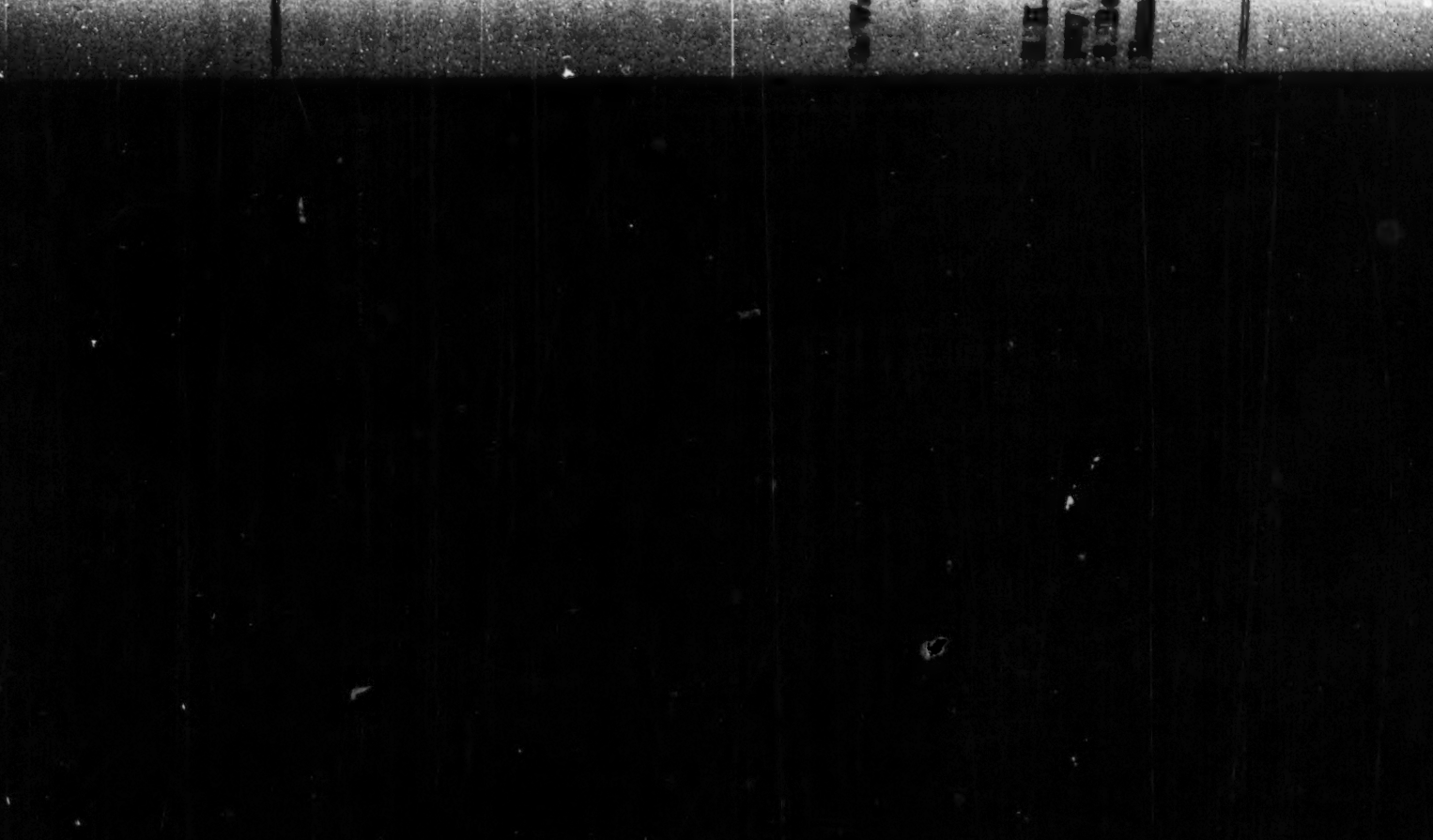
THOMAS E. POWERS, ET AL.,

[redacted]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[redacted]

M. H. Tachirgi, Morton Tachirgi, Arthur Land Company (a Montana corporation), A. S. Belken, [redacted] G. Belken, Judy Walsh, H. G. Campbell, Jay L. Herman, Nichols Bethlehem, Mary Bethlehem, [redacted] Miller and Robert J. Miller.



No. 5102

In the Supreme Court of the United States

OCTOBER TERM, 1938

For the Ninth Circuit

UNITED STATES OF AMERICA,
Petitioner,

vs.

THOMAS R. POWERS, ET AL.,
Respondents.

it of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS,

Tschirgi, Bertha Tschirgi, Antler Land Com- (a Montana corporation), B. B. Belken, Edith lken, Judy Walsh, H. G. Campbell, Jay L. n, Nickels Dethlefsen, Mary Dethlefsen, Billie Miller and Robert J. Miller.

BILLINGS GAZETTE, BILLINGS, MONTANA

SUBJECT INDEX

Page

Statement of the Case 1
Nature of the case 1
Petitioner's Contention 2
Respondents' Contention 4

Logical Conclusions from Evidence 10
Treaty May 7, 1868, reserved water for Indians #1 10
Indians granted right to make selections #4 11
Rankin Instructions #7 12
Rankin allotted Indians #8 13
40 acres irrigable land allotted each Indian #10 13
Dead Indian allotments sold by United States #11 13
Antler Land Company title #11 13
Roblin Allotment #14 16
1-2-4 Equality Clause Act #15 17
Secretary classified these lands as irrigable #17, 18 18
Edith G. Belken et al. title 22
Billie Miller title 23
Robert J. Miller title 23
Nickels and Mary Dethlefsen title 24
Jay L. Henman title 24

Foreword 25

Petitioner's Third Contention Not In Issue 27

Argument—

I. Water Reserved for Individual Indians 27
Judicial Interpretation 28
Intention of the Government 31
Rights Granted by Allotments and Patents 37
Fallacy of Part I of Petitioner's Argument 38

SUBJECT INDEX (Continued)

II. Water Became Appurtenant on Allotment ... 41
Rights of Purchasers of Indian Lands and Water ... 44

III. Record Misquoted ... 46

IV. Rights and Actions of Secretary ... 48
Rights of Secretary of Interior to Make Division ... 48
Secretary Made No Distribution of Water ... 51
Act of March 3, 1891 ... 52

V. The Equities ... 54
Not an Action to Protect Indians ... 54
Bozeman Trail Ditch ... 54

This is an Injunction Suit ... 59

Conclusion ... 60

CITATIONS

Page

Cases:

British-American Co. v. Board, 229 U. S. 159, 81 L. Ed. 95 ..... 37, 38
Chase v. U. S., 222 Fed. 593 ..... 41, 43
Choate v. Trapp, 244 U. S. 665 ..... 40, 41, 42, 43, 44
Conrad Inv. Co. v. U. S., 161 Fed. 829 30
English v. Richardson, 224 U. S. 680, 56 L. Ed. 949 41
In re Heff, 197 U. S. 488, 25 S. Ct. 506, 49 L. Ed. 848 43
Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49 ..... 41, 43
Kofoed v. Bray, 69 Mont. 78, 220 Pac. 532 40
Mason v. Sams, 5 F. (2d) 258 ..... 26, 49, 50
McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648 40
Morrow v. U. S., 243 Fed. 854 41
Scheer v. Moody, 48 F. (2d) 327 ..... 22, 26, 31, 46, 51
Sisemore v. Brady, 235 U. S. 441, 59 L. Ed. 308 41
Skeem v. U. S., 273 Fed. 93 31
Sloan v. Glancy, 19 Mont. 70 40
Sweetland v. Olson, 11 Mont. 27, 27 Pac. 339 40
U. S. v. Conrad Inv. Co., 156 Fed. 123 29
U. S. v. Parkins, 27 F. (2d) 909 31
U. S. v. Heinrich, 12 F. (2nd) 938 ..... 43, 44, 53
U. S. v. Hibner, 27 F. (2d) 912 ..... 22, 26, 31, 45
U. S. v. Wightman, 230 Fed. 277 ..... 30, 51
Williams v. Johnson, 239 U.S. 414, 60 L. Ed. 358 41
Winters v. U. S., 207 U. S. 564, 52 L. Ed. 340 ..... 3, 5, 7, 10, 28, 30, 31, 34, 37, 39
Winters v. U. S., 143 Fed. 473 28
Worcester v. Georgia, 6 Peters 515, 8 L. Ed. 483 25

Statutes:

Act of May 7, 1868, 15 Stat. 649 (Crow Treaty), 2 Kappler 1008 ..... 5, 7, 10, 11, 28, 32, 42
Act of April 11, 1882, 22 Stat. 42 ..... 11, 12
Act of February 8, 1887 (Allotment Act), 24 Stat. 388, 1 Kappler 35 ..... 3, 9, 11, 12, 29, 33, 58
Act of May 1, 1888, 25 Stat. 113 29

Statutes (Continued):

Act of March 3, 1891, 26 Stat. 1040, 1 Kappler 433 3,
Act of Aug. 14, 1899, 33 Stat. 352, 3 Kappler 88 .....
Act of May 8, 1906, 34 Stat. 182, 3 Kappler 182 .....
Act of June 25, 1910, 36 Stat. 860, 3 Kappler 480 17,
Act of June 4, 1920 (Crow Act), 41 Stat. 751, 4 Kappler 271 .....
Act of June 10, 1922, 42 Stat. 625 .....
Act of Aug. 9, 1937, 50 Stat. 580 .....

In the Supreme Court of the United States

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OCTOBER TERM, 1938

For the Ninth Circuit

UNITED STATES OF AMERICA,
Petitioner,

vs.

THOMAS R. POWERS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS,

M. H. Tschirgi, Bertha Tschirgi, Antler Land Company (a Montana corporation), B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Nickels Dethlefsen, Mary Dethlefsen, Billie Miller and Robert J. Miller.

NATURE OF CASE.

This is an action brought by the United States of America, as guardian for its Indian wards on the

Crow Reservation, wherein an injunction is sought against the respondents to restrain them from using or diverting the waters of Lodge Grass Creek and Little Big Horn River, located on the Crow Indian Reservation, Montana.

PETITIONER'S CONTENTION.

Petitioner alleges that there is a shortage of water in the Little Big Horn River and Lodge Grass Creek and that there is not sufficient water to properly irrigate the land lying under the six United States Indian Irrigation Service ditches and the Bozeman Trail ditch, a private ditch. The United States claims a superior right to the water in these two streams and contends that it is entitled to the exclusive use of such water, regardless of whether such ditches serve Indians or white owned land. (Petitioner's Brief p. 29.) Petitioner alleges that the respondents are using water from these two streams in the irrigation of land on the reservation and seeks to restrain the respondents from such use.

The legal position of the United States as set forth in Petitioner's Brief is as follows:

I.

(a) Both the land and the water of the Crow Tribe Reservation were "prior to some division or allotment in severalty" held "by the tribe in common ownership." (Petitioner's Brief 16.)

(b) The reservation of the waters, as determined

by the case of **Winters vs. United States**, 207 U. S. 564, 52 L. ed. 340, was for the Indian Tribe, as a tribe, and not for the individual Indians who were members of the tribe. (Petitioner's Brief 17.)

II.

(a) Congress, acting within its plenary powers, directed the allotment, patenting or sale of the reservation lands, in severalty, but retained the control of the water. (Petitioner's Brief 21-25.)

(b) The Secretary of the Interior was, by Sec. 7 of the Allotment Act of February 8, 1887 (24 Stat. 388, 1 Kappler 35) granted control of the waters of the Crow Indian Reservation and authorized to make distribution thereof. (Petitioner's Brief 25, 27.)

(c) The construction of Government Irrigation Systems, with tribal money, was an allocation of the waters to the lands under the project to the exclusion of lands, of similar status, which were not under the project. This position is set forth at page 28 of Petitioner's Brief in these words:

> "If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, the Act of March 3, 1891 (26 Stat. 1040, 1 Kappler 433) passed in pursuance of an agreement with the Crow Tribe and the construction of irrigation works under authority of that statute have set apart and reserved the waters in question for the lands under the system of irrigation so established. In no event would such reserved waters pass to allottees of lands which were not under this system."

Briefly stated, the petitioner's contention is that the water belonged to the Tribe, as a whole, and that the Tribe and Congress granted authority to the Secretary of Interior to allocate the waters to the lands of some Indians and refuse it to the lands of other Indians.

RESPONDENTS' CONTENTION.

The respondents are owners of lands on the Crow Indian Reservation which originally were the allotments of members of the Crow Tribe of Indians. The Indians to whom these lands were allotted have died and the United States, as guardian of the Indian heirs, sold the lands, at public sale, and at these sales the defendants, or their predecessors in interest, became the purchasers. These sales were made for the benefit of the Indian heirs of the original allottee, and the proceeds of the sales went to the Indian heirs. The United States issued a fee patent to the purchaser which patent conveyed the land,

> "together with all rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging"

and without any reservation of water or water rights. (R. 460, 484.)

In a few instances a fee patent to the lands was issued to the Indian and the Indian sold to these respondents. These patents are in the same form as

hose issued on Government sales and convey all of he appurtenances. (R. 487.)

The title vests in the respondents by mesne conveyance from the original patentees, which conveyances are warranty deeds conveying the "premises, ogether with all tenements, hereditaments and appurtenances" and without any reservation of water r water rights. (R. 462.)

The titles of the respondents are of the same legal tatus as those of the white owned lands under the Government projects.

Respondents contend, and petitioner admits, that nder and by virtue of the Treaty of May 7, 1868 (15 Stat. L. 649), the lands on the Crow Reservation were recognized as the common property of the Indians of he Crow Tribe. (Petitioner's Brief 15-17.)

By virtue of the same treaty, as interpreted by the **Winters case** (207 U. S. 564) the use of the waters of said reservation were reserved by the Indians for use on said land. The Government intended the individual Indians of the Crow Tribe to have a country upon which they could make a living by agricultural pursuit. Unless the water went with the land the purpose of the treaty would be defeated. It was evident, even then, that certain lands of the reservation were so situated that water from the streams could be run, by gravity, upon them for agricultural purposes.

Heretofore, the Indians had made their livelihood

by hunting and this mode of living need recognize no individual real estate rights; the buffalo and the deer roamed over all of the country and any member of the tribe had the right to pursue and take such game at any place on the common territory. But when the habits of the Indians were to be changed to those of an agricultural and pastoral people and they were to make their livelihood by farming, it was very evident that a common ownership of the real estate must cease. If they were to become farmers, and make their living from that source, it was necessary that they have lands capable of producing crops. In order to produce crops it was necessary that they have the irrigation water needed to grow the grain and food for themselves and their livestock.

The purpose of the Government was to break up the roaming, tribal existence of the Indian and to make him a rugged individualist. He was to be encouraged to own his own individual property, farm his own land and raise his own cattle. He was to take up the ways of the white man and become self-supporting. The Government told him, by the Treaty of 1868, that from the common tribal lands he would be given his equal proportion, which he was to possess and own in severalty. It was feared that, at first, he might not be capable of managing his own affairs and so the change was to be gradual and with the Government supervising his affairs until he was capable of managing them himself.

Under the 1868 Treaty the individual Indian was given the right to make a selection of the land he wanted. In due time a survey was to be made of the reservation and he was to be allotted the land chosen by him, unless his selection conflicted with the rights of others. And, later, a trust patent was to be issued to him designating the lands which were his. The title to these lands was to be held by the United States for a trust period of twenty-five years, during which period the Indian should have the right of possession, use and occupancy of the land and all the appurtenant rights. At the end of twenty-five years a fee patent was to be granted to the Indian making the land his absolutely.

When the lands were allotted to the individual Indian he ceased to have an interest in the common property so divided but took the lands allotted to him in severalty.

When he had no individual lands he had no use for individual water. When he took a parcel of ground which was capable of irrigation he had need for individual water for that land. The irrigable land without the water was valueless. The two went together. To say otherwise is to entirely defeat the policy of the Government and the intention of the Indian as expressed in all of the treaties and acts of Congress and as clearly set forth in the **Winters case.**

In 1901 Special Allotting Agent, John K. Rankin, was directed by the Government to allot certain sur-

plus lands on the reservation to the Crow Indian. He was informed that there was sufficient irrigable land on the Crow Reservation to give each Indian 40 acres of irrigable land and he was instructed to make his allotments so that each Indian would be given that amount of irrigable land. (R. 452.)

When the Government directed Rankin to allot to each Indian 40 acres of irrigable land it must have intended that he have sufficient water for that 40 acres, **otherwise he would not be receiving irrigable land.**

Rankin gave each Indian approximately 40 acres of such land and later when United States Allotting Agent, Roblin, reclassified the same lands **he designated as irrigable all lands capable of irrigation whether they were under a United States Irrigation Service project or private ditch.** (Exs. 18, 51.) (R. 459, 560.)

It is our contention that if all of the Rankin allottees had lived and retained their lands, each one, who was allotted irrigable lands (i. e., land capable of being irrigated by gravity), would be entitled to sufficient water to irrigate all of his land capable of irrigation; if there was not sufficient water to irrigate all of his irrigible lands, each Indian would then be entitled to his pro rata share of the available water. **Respondents firmly contend that neither the Government, the Secretary of the Interior nor the Commis-**

sioner of Indian Affairs could deprive any one Indian of his portion of the available water to the advantage of any other Indian. Neither could the Secretary of the Interior say that any one Indian or group of Indians were entitled to the first use of the waters. Each had a **vested right,** which could not be taken from him, to the use of sufficient water to irrigate his irrigable land.

The manner in which he transported his water to his land was the individual concern of each Indian. He could build his own ditch; join with others in constructing a common ditch; or if fortunate, talk the Government into using treasury and tribal moneys to build a ditch for him. **HIS RIGHT TO THE WATER MUST NOT BE CONFUSED WITH THE MEANS OF TRANSPORTING IT TO HIS LAND.**

The United States saw fit to construct irrigation systems which delivered one Indian's water to that Indian's land and neglected to construct irrigation systems to take the water belonging to another Indian to that Indian's land, but the latter fact did not increase or diminish the rights of the Indian owners of irrigable land to the use of their waters.

The building of irrigating systems was not an exercise of the delegated power to the Secretary "to secure a just and equal distribution thereof (water) among the Indians residing upon any such reservation." (Treaty of February 8, 1887, 1 Kappler 35,

24 Stat. 388.) Certainly no authority could ever be given the Secretary to deprive any Indian of his VESTED RIGHTS. The United States may be the guardian of the property of all the Indians, BUT NO GUARDIAN HAS THE RIGHT TO TAKE THE PROPERTY OF ONE WARD AND GIVE IT TO ANOTHER WARD.

Respondents further contend that the purchaser of the Indian title stepped into the shoes of the Indian allottee and, thereby, became entitled to th same pro rata share of the available water as his Indian predecessor.

LOGICAL CONCLUSIONS FROM THE EVIDENCE.

Respondents, Antler Land Company, Edith G. Belken, Judy Walsh, H. G. Campbell, Robert J. Miller, Billie Miller, Jay L. Henman, Ruth Henman, Nickels Dethlefsen and Mary Dethlefsen introduced evidence to prove and maintain the following facts and legal propositions:

1. That, by the Treaty of May 7, 1868 (15 Stat. L. 649), the United States recognized the lands of the Crow Indian Reservation as the property of the Crow tribe of Indians and by said treaty the waters of the reservation were reserved for the Indians of the Crow tribe. **(U. S. v. Winters,** 207 U. S. 564.)

2. That while the United States held the fee to the lands of the Crow Reservation, it had no interest in,

right or title to the said lands except as a holder of naked legal title, which title was held in trust solely for said Indians.

3. That at all times from and after May 7, 1868, the waters of said reservation were vested (as much as waters may be vested) in the Indians residing upon the Crow Reservation.

4. That by virtue of Section VI of the Treaty of May 7, 1868 (15 Stat. 649, 2 Kappler 1008), the individual Indians were granted the right to make "selections" of not to exceed 320 acres. The land thus selected was thereupon to cease being held in common but was to be occupied and held as the exclusive property of the Indian making this selection. The treaty provided that the President should make a survey of the reservation and Section XI thereof guaranteed the protection of the Indian in his selection.

5. That the act of April 11, 1882 (22 Stat. L. 42), which was based upon and carried out the promise of the treaty of May 7, 1868, provided for a survey of the reservation for allotments to the individual Indians, for the issuance of trust patents and finally fee patents.

6. That under the authority of the treaty of May 7, 1868, the act of April 11, 1882, and of the act of February 8, 1887 (24 Stat. L. 388), the following In-

dians made selections of lands which are now under the private ditch of Antler Land Company, to-wit: The Wolf, #1328; Little Face, #1349; Deaf, #1350; Medicine Horse, #1351; Gives Away, #1686; Young Duck, #1707; and Heifer Woman, #1708. Each of these Indians died prior to the allotments made by United States Special Alloting Agent, John K. Rankin.

7. That said Allotting Agent, John K. Rankin, on or about June 26, 1901, received instructions from the Commissioner of Indian Affairs to allot the land on the reservation in accordance with the acts of April 11, 1882 and February 8, 1887. The exact procedure which he was to follow was set out in detail in such instructions and among other things he was to

(1) Allot 160 acres of agricultural and 160 acres of grazing land to the head of a family.

(2) Allot to each married woman 80 acres of agricultural or 160 acres of grazing land.

(3) Allot to all others 80 acres of agricultural and 80 acres of grazing land, and

(4) Each allottee was to receive the same amount of irrigable land. The instructions recited that it was thought 40 acres of irrigable land would be an ample quantity, but Rankin was instructed to confer with the Agent and Superintendent of Irrigation to determine the number of Indians and the number of acres of irrigable land and if there was sufficient irrigable land to give each Indian more than 40 acres, Rankin was to increase the number of irrigable acres given each Indian in his allotment.

Rankin was further instructed that where Indians had made "selections" but had died before

Rankin's allotment, the land in the selection should be allotted, by Rankin, to the heirs of the deceased Indian. (Ex. 17; R. 453.)

8. Rankin allotted the deceased Indians, Heifer Woman, Young Duck, Little Face, Deaf, Medicine Horse, Wolf, and Gives Away, and also Yellow Coyote, #1705, and Mad Bear Wolf, #1704, who were still living at the time of his allotment. All of these had made selections prior to Rankin's allotment and Rankin reallotted them. (Ex. 18; R. 459.)

9. On the Ladow land, under lease to defendant Antler Land Company, The Meat, #1700, and The Back, #1701, had made selections prior to Rankin. Buffalo that Sings, #1702, and Ella Meat, #1703, daughters of The Meat and The Back, were the first allotted by Rankin. (Exs. 18, 49; R. 459, 559.)

10. On each of the allotments mentioned in paragraphs 6, 8, 9, and 14, of this section of our brief, there are approximately 40 acres of irrigable land. All of this irrigable land is under what is designated as the United States Indian Service proposed Upper Little Horn Ditch #1, and are now under and irrigated by the ditch of the defendant Antler Land Company, which is called the Farmers Alliance Ditch. (Ex. 34; R. 495.)

11. All of the allottees described in said para-

graphs 6, 8 and 9 died and their lands were sold by the United States, under the provisions of the Act of May 8, 1906 (34 Stat. L. 182, 3 Kappler 182), and acts amendatory thereto. Patents in fee, without restrictions as to water, were issued to the purchasers. These patentees, by warranty deed with the usual covenants as to hereditaments, appurtenances, etc., conveyed the premises to F. M. Heinrich and he, by similar conveyance, to the defendant Antler Land Company. None of these warranty deeds made any reservation of the water and the Antler Land Company is now the owner of the irrigable lands described in the allotments set forth in paragraphs 6 and 8, supra, and as such owner is possessed of all of the rights of ownership, use and possession which were possessed by the original patentees. (Ex. 28; R. 481.) Mrs. Barney Ladow is likewise the purchaser and owner of the lands covered by the allotments set forth in paragraph 9, supra. (Ex. 30; R. 486.)

12. On November 16, 1905, the plaintiff, by S. G. Reynolds, Superintendent of the Crow Reservation, acting "for and on behalf of the Indians of the Crow Indian Reservation in Montana" filed in the office of the County Recorder of Rosebud County, Montana, that being the county where the said lands were then located, a water right appropriation for 156.25 cu. ft. of water for the irrigation of the lands now owned by Antler Land Company, and Mrs. Barney Ladow.

In the notice of appropriation the described location of the ditch which the Government proposed to construct is practically identical with the location of the Farmers Alliance ditch. (Ex. 33; R. 492.)

Since construction of the ditch was not commenced within three years after the date of the filing of the appropriation, the United States of America through its Indian Agent, Even H. Estep, by authority of the Secretary of the Interior, on July 27, 1914, filed a similar appropriation. (Ex. 45; R. 534.)

These filings are significant because it can be held against the petitioner as an exercise of the right of the Secretary of the Interior to set aside the waters of the Little Big Horn River for use on the lands of these respondents. These filings are also significant because they show that the United States then made no claim to a superior water right for its projects ipso jure as is now the contention of the petitioner.

13. Preliminary surveys of proposed Upper Little Horn Ditch #1 were made by the United States in 1903. (R. 361, 495, 511.) In 1910 work was commenced, by the Government, on Upper Little Horn Ditch #2 and that ditch was completed in 1914. (R. 350.)

The predecessors of Antler Land Company were told by the representatives of the government, in charge of that work, that when Upper Little Horn Ditch #2 was finished that Upper Little Horn Ditch

#1 would be commenced. (R. 499, 513. Offers of proof.) In 1914 when #2 ditch was finished the Government construction crews were withdrawn and that was the first time that predecessors of Antler Land Company knew that Upper Little Horn Ditch #1 was not soon to be constructed by the United States. When this became apparent the predecessors of Antler Land Company started to construct their own ditch. (R. 500.) The Tschirgi (Farmers Alliance) ditch irrigates the same land and has practically the same location of ditch as the Government proposed Upper Little Horn Ditch #1. The actual construction of the Farmers Alliance Ditch was started about August 31, 1915, and was carried on to completion with diligence. (R. 489, 492.)

14. Included under the Farmers Alliance Ditch and watered thereby are the following lands which are still owned by the original Indian allottees, or their heirs, to-wit: Carson Yellowtail, #854; Josiah Thomas Yellowtail, #855; Amy Yellowtail, #856; Whitewoman, #888; Whitebear, #820; Chester Otterchief, #1107; Lucy Yarlott, #1132; Benjamin Hillside, #1179; Yellowbrow, #1310; Whitehip, #1410; Carrie Coverup, #1582; Mrs. David Yarlott, #1693; Grove Stewart, #3549; Sterling Lee Throssel, #3585; and Ralph Emmett Throssel, #3586. (Ex. 29; R. 485.)

Under the Farmers Alliance Ditch there are also the allotments of Joseph Garrett Stewart, #3552;

Henry Keiser, #3513; Juanita Keiser, No. 2, #3314. The last three named allotments are now owned by Antler Land Company. (Ex. 29; R. 485.)

All of the lands of the above allottees, under the Farmers Alliance Ditch, are the same character as to irrigable, agricultural or grazing type, as the lands of the defendant, Antler Land Company, and those of Mrs. Barney Ladow, as may be plainly seen from the map. (Ex. 29; R. 485.)

15. Act of June 25, 1910 (36 Stat. L. 860, 3 Kappler 480), provides for further allotting and contains the so-called "equality clause" which provides that if it appears

> "That lands on any Indian reservation, subject to allotment by authority of law, **have been** or **may be** brought within **any** irrigation project (note it does not say **any Government or any United States Indian Irrigation Service Project**) * * * such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-agricultural grazing land" (blackface and note in parentheses ours),

and provides that in making future allotments the old allotments shall be reclassified as to unit value, irrigable lands as four units, agricultural lands as two units, and grazing lands as one unit, and after the Indian has received his proportion of irrigable and agricultural lands his unit quota shall be filled by the allotment of grazing land. This is the "1-2-4"

classification used by United States Special Allotting Agent, Charles E. Roblin.

16. June 4, 1920, Congress passed the Crow Act (41 Stat. L. 751, 4 Kappler 271) which among other things provided for the allotment of the surplus land on the Crow Reservation in accordance with the provisions of the act of June 25, 1910 (36 Stat. 860, 3 Kappler 480), as to the "1-2-4" ratio on irrigable lands. This act is the direct authority for the Roblin allotments.

17. In 1921, Special Allotting Agent, Charles E. Roblin, was given instructions by the Secretary and Commissioner to allot all surplus lands on the Crow Reservation, except the unsurveyed area in the Pryor and Big Horn Mountains. He was instructed to make allotments to all Indians living December 4, 1920, and to the heirs of those who had died after December 31, 1905, but he was to make no allotments to Indians who had died prior to December 31, 1905. (Exs. 46, 47, 48; R. 535-558.) Under these instructions Roblin had nothing whatever to do with the allotments or classification of the lands of the allottees described in paragraphs 6, 8 and 9, of this section of our brief, because these allottees were dead before December 31, 1905. Roblin made no classification of these lands but he did classify the lands, described in paragraph 14 of this section of our brief, as IRRIGABLE. (Ex.

51; R. 560.) The Secretary of the Interior on June 7, 1923, approved these allotments and classifications. (Ex. 48; R. 547-558.) **How now can the United States claim that these lands are not irrigable?** If Roblin had had the opportunity it is only reasonable to say that he would have classified all the lands under private ditch as irrigable as he did the three similar tracts shown in Ex. 18; R. 459, and the fifteen tracts, under the Farmers Alliance Ditch, as shown in Ex. 51, R. 560, and the map, Ex. 29, R. 485.

Roblin and the Indian Bureau officials computed the land on the reservation in the value of units; one acre of grazing land was called one unit, one acre of agricultural land was two units and one acre of irrigable land was four units. The total number of units thus arrived at was divided by the total number of Indians entitled to receive allotments (1768); and it was thereby determined that each allottee was entitled to 1040 units. That is, that if the Indian took all grazing land he would receive 1040 acres; if he took all agricultural land he was entitled to 520 acres or if he could get all irrigable land he would receive 260 acres. Since there was not enough irrigable and agricultural lands to go around, and in order that a fair distribution should be made, the allotment was divided among the classes so that he received some of each classification of land, with a total of 1040 units. (Ex. 48; R. 550.)

Roblin re-classified all lands already allotted and charged the Indians with the number of units comprised in his old allotment and then gave him enough surplus land to make up his quota, 1040 units. (Ex. 48.)

18. All of the lands under the Farmers Alliance Ditch which came under the Roblin survey were classified by him as irrigable, including the three Antler owned allotments of Henry Keiser, Juanita Keiser No. 2 and Joseph Garrett Stewart as well as the fifteen Indian owned allotments described in paragraph 14, supra, and each of the eighteen Indians were charged with four units for each acre of land under the Farmers Alliance Ditch. (Exs. 18, 51; R. 459, 560.)

19. On April 26, 1923, Mr. Roblin and Mr. C. H. Asbury, Superintendent of the Crow Indian Reservation, submitted the Roblin allotments to the Indian Office at Washington. On the same day the Indian Office at Washington submitted the allotment schedules of the Roblin allotments to the Secretary of the Interior for approval with recommendation that patents be issued in accordance with the schedules and on June 7, 1923, F. M. Goodwin, Assistant Secretary of the Interior, on behalf of the Secretary of the Interior, approved the Roblin schedules of allotments (Ex. 51; R. 560) and thereafter patents were issued in accordance with the said schedule.

In the schedule of allotments approved there are eighteen pieces of land under the Farmers Alliance Ditch, similar in character to the land of Antler Land Company and Mrs. Ladow, which were classified as irrigable and which the Secretary of the Interior by his approval adjudged as irrigable.

It follows, without further reasoning or argument, that since these lands are irrigable, they must be irrigable by waters from Little Big Horn River and, therefore, the petitioner, having declared them irrigable, cannot now attempt to deny the owner of these lands the water necessary to make them come within the classification it has given them.

20. We contend, then, that as a conclusion of law, the original Indian allottee, if he had lived and still owned the land, would have been entitled to the use of the waters of the Little Big Horn River to irrigate his irrigable land which is under the Farmers Alliance Ditch, in the same manner that the living allottees, described in paragraph 14, supra, are now entitled to the use of said waters.

21. The lands under Upper Little Horn Ditch #1 are irrigable—the petitioner recognizes them as irrigable by the Rankin and Roblin allotments, and—by the proposed construction of Upper Little Horn Ditch #1—not to mention the fact that the respondent has, by use, proved them to be irrigable.

22. Under the **Hibner case,** 27 F. (2d) 912, and **Scheer v. Moody,** 48 F. (2d) 327, 330, the purchaser of Indian allotted lands stands in the shoes of the Indian allottee and has the same rights to the use of the water as his Indian predecessor had.

Edith G. Belken, Judy Walsh and H. G. Campbell lands.

1. All of the grounds urged in behalf of Antler Land Company are available to Edith G. Belken, Judy Walsh and H. G. Campbell with the exception of the dates of filing, date of starting of construction work and that the Belken, Walsh and Campbell lands are under what is described by the petitioner as its proposed Upper Little Horn Ditch #3 instead of #1, and with the further exception that Roblin allotted no lands under Upper Little Horn Ditch #3. This is explained by the fact that all of the allottees under #3 had died before Roblin's allotment, otherwise, it is safe to assume that he would have classified the lands under #3 as irrigable in the same manner as he did the lands under #1.

2. The H. G. Campbell (Mabel Pace) lands are the allotments of Wrinkle Face, #1722, and Medicine Coyote, #1287. These were selections made prior to the Rankin allotment and Rankin re-allotted them. (Ex. 18; R. 459.)

3. The Belken and Walsh lands are the allotments of Crazy Head, #1642, and Pretty Face, #1643. Crazy

Head made a selection prior to Rankin but Pretty Face, who was Crazy Head's wife and not the head of a family, could not make a selection and so her first allotment was under Rankin. There are 77.1 irrigated acres under the Crazy Head allotment and only 3.2 under the Pretty Face allotment. (Ex. 18; R. 459, 534.)

Billie Miller lands.

Billie Miller owns the allotment of Does Anything #1396, upon which there are 111.6 acres of irrigable land and which are now being irrigated. Does Anything made a selection of 160 acres prior to the Rankin allotment. Immediately after the Indian allottee disposed of his title to this land, Billie Miller, the allotte's successor in interest, appropriated and used the waters of Lodge Grass Creek to irrigate these 111.6 acres. Patent in usual form was issued to Billie Miller. (Ex. 39; R. 522.)

Robert J. Miller lands.

Robert J. Miller owns the allotments of Pounded Meat, #1391, Strikes A Feather, #1392, Holds A Feather, #1387, Eagle, #1386, and Plain To See, #493. All of these Indians had made selections prior to Rankin. Plain To See had died before the Rankin allotment and his lands were allotted by Rankin to his heirs. All of the other allottees had died before

the Roblin allotment so he had no chance to classify their lands as irrigable, but it is a certainty that Roblin would have made the same classification of these lands as he did of the lands under the Farmers Alliance Ditch as set forth in paragraph 14, Antler Land Company, and designated them as irrigable. The Robert J. Miller patents have the usual covenants as to appurtenances. (R. 516 to 522; Ex. 2; 325.) Miller has been irrigating 143 acres continuously since 1915. (R. 517.)

Nickels and Mary Dethlefsen lands.

The Dethlefsen land was the original allotment of Rose Martinez, Arthur Peters, Alice Peters and George Peters, members of the Crow Tribe. (Exs. 19, 21, 23, 25; R. 460 to 468.) The husband of Rose Martinez and the father of the other allottees constructed the irrigation ditch for irrigating these lands in 1896 and from 1901 or 1902 these lands were continuously irrigated until they were sold to Dethlefsens. (R. 476, 477.) The Dethlefsens purchased these lands in 1922 and continuously irrigated the same and raised crops ever since. (R. 479.)

Jay L. Henman and Ruth Henman lands.

The Henman lands are in the allotments of Goesahead, #1166, Pretty Shield, #1167, and Crazy Sisterinlaw, #1175. Goesahead and Crazy Sisterinlaw

had made selections prior to Rankin but died before the Rankin allotment. Pretty Shield is the wife of Goesahead and was not entitled to a selection. She was allotted by Rankin and also by Roblin. Roblin had nothing to do with the lands of Goesahead and Crazy Sisterinlaw because they were dead prior to his time, but he did allot Pretty Shield and did not classify any of her lands as irrigable. He thought this land was not irrigable by gravity. But a tunnel has been constructed which makes this land irrigable by gravity, and the land is now being irrigated. It, therefore, comes within the classification which is entitled to water. (R. 525 to 528.)

FOREWORD

Before proceeding further there are two matters which we wish to call to the attention of the Court, which are not properly a part of the argument, but which will enable the Court to better understand our argument:

1. None of the decisions refer to the Indians as a tribe, with the intent to mean a body corporate. In speaking of the Indians the Courts mean the **members** of the Tribe or Nation as a collection of individuals. The word tribe or nation is used as a collective term of associated individuals to distinguish them from other people who may have a different language or characteristics. Chief Justice Marshall in the **Worcester** case (6 Peters 515; 8 L. ed. 483, 500) defines

the word Nation, which we use interchangeably wit
the word Tribe, as "a people distinct from another'
And when in our answer and in this brief we spea
of the rights of the Indians, we have reference to th
individual Indians who collectively make up the trib
or nation. This distinction is plainly set forth in th
case of **Mason v. Sams**, 5 Fed. (2d) 258.

2. In speaking of "the right to the use of water'
"ownership of water," or "water appurtenant to th
land", we are not attempting to define or establish th
legal status of the particular rights which the respo
dents have to the use of the waters of Lodge Gra
Creek and Little Big Horn River. We are not a
tempting to establish the amount of water to whic
petitioner or any of the respondents are entitled. Th
is not an action to adjudicate the water rights in thes
streams. It is an action to entirely restrain the r
spondents from using **any** of the waters of thes
streams, and if the respondents, or any of them, a
entitled to **any** water the petitioners' case must fail a
to them. Therefore, in this action it is not necessar
to determine whether the waters are "appurtenan
to the allotted land" as stated by Judge Bourquin i
the case of **Schee v. Moody**, 48 F. (2d) 332, or tha
we have "the ownership of both the land and water
as stated in the **Hibner** case (27 Fed. (2d) 911), o
whether we have the usufructuary right only. Th
question is: Does the petitioner have the right to e
clude respondents from the use of any water?

Petitioner's Contentions Not In Issue.

Counsel for defendants, Dethlefsen and Yates, asked for an adjudication of the waters and requested that all other appropriators be made defendants in the trial court. But Yates is not in this Court, and the original counsel for Dethlefsen have withdrawn from the case. Their contentions have never been urged by present counsel. That portion of the trial court's findings attempting to adjudicate the waters and granting one-half inch per acre was inserted at the request of original counsel for Dethlefsen, and we have no objection to the action of the Circuit Court of Appeals in striking it out.

This disposes of the third part of petitioner's argument which commences at page 31 of its brief, and we will present no argument relative thereto.

ARGUMENT

I.

WATERS RESERVED FOR INDIVIDUAL INDIANS.

The theory of the Government in the trial court and in the Circuit Court of Appeals was that the United States is the owner of the waters of the streams of the Crow Indian Reservation.

The Government has abandoned that contention and now agrees with the position respondents have taken from the beginning, i.e.—**the waters were reserved, by**

the Treaty of May 7, 1868, for the Indians (Petitioner's brief 17), but petitioner claims that the reservation was for the tribe, as a whole, and not for the use of the individual Indians who were given the lands. This is the first legal question presented by this appeal.

JUDICIAL INTERPRETATION.

This Court, in **Winters v. United States**, 207 U. S. 564, in establishing the law that the "Indians" reserved the waters, at page 576 of the opinion, says:-

> "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless."
>
> **Winters vs. United States, 207 U. S. 564.**

And the opinion of the Circuit Court in the decision appealed from reads, in part:-

> "We are of the opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the Court below 'to insure to the Indians the means wherewith to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed." **Winters v. U. S., 143 Fed. 743. 746.**

It must be noted that in these opinions 'Indians" and not "tribe of Indians" are mentioned. Nowhere is

it stated that the "tribe" retained the right to use the waters of Milk River.

The Circuit Court of Appeals for the Ninth Circuit, in the case of **U. S. v. Conrad Investment Company, 156 Fed. 123,** at page 127, says:-

> "The government has the legal title, and, while it may be said to hold the lands in trust for the **Indians who are in the occupancy thereof for** permanent homes (Act, Congress May 1, 1888, c. 213, 25 Stat. 113), yet it is their guardian and protector, and is bound by the policy it has adopted and long maintained towards them to conserve their rights and interests until released from guardianship; it being designed that eventually its release shall come through allotments in severalty in pursuance of the general allotment act of February 8, 1887 (24 Stat. 388, c. 119.)"

And at page 129:

> "* * * The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. * * * And Major Dare, the agent in charge, tells us that about 90 percent of the Indians on the reservation have taken up separate settlements. This denoted progress in the way of the government's policy, and gives promise that its full hopes may yet be realized. Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, how-

> ever, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such **streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I might say, even possible future needs,** when they have ultimately secured their allotments in severalty." (Boldface ours.)

In the entire opinion no reference is made to the right of the Indians as a "tribe" to any water on the reservation.

In **Conrad Inv. Co. v. U. S., 161 Fed. 829, 831,** the Court in commenting upon its decision in the **Winters** case said:

> "that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the **benefit of the Indians** on the reservation to the extent reasonably necessary to **enable them to irrigate their lands,** and that the 'settlers on public lands outside of the reservation could not acquire * * * the right to divert the waters of Milk river to the prejudice of the **rights of the Indians residing upon that reservation'.**" (Boldface ours.)

No reference was made to the rights of the Indians **as a tribe.**

U. S. v. Wightman, 230 Fed. 277. Action was brought "by direction of the Attorney General * * * in behalf of the **United States and the Indians residing upon the San Carlos Indian Reservation in Arizona.**" No mention was made of the **tribe.** (p. 278.)

In **Skeem v. United States,** 273 Fed. 93, no mention is made of any rights of the tribe. Only rights of individual Indians were considered.

The same is true of **U. S. v. Parkins,** 18 Fed. (2d) 62; **U. S. v. Hibner,** 27 Fed. (2d) 909 and **Scheer v. Moody,** 48 Fed. (2d) 327.

INTENTION OF THE GOVERNMENT.

The **Winters case** holds that the waters were reserved for use on the arid lands of the reservation so that the Indians could make their living as an agricultural and pastoral people; and that without irrigation these lands were valueless.

It was not contemplated that the agricultural and pastoral pursuits should be carried on as a tribe, OR THAT THERE SHOULD BE ANY COMMUNISTIC FARMING. On the contrary, the treaties provide that the lands should be allotted in SEVERALTY.

Prior to the enactment of the allotment acts, the Indians held tribal land in common. No individual Indian had a right to any particular property, and hence he had no right to any particular quantity of water. He had no right to alienate any proprety because he had no ownership in severalty; and when he died, his rights in the lands, the waters, and the occupancy and use of both ceased, for the reason that no member held title to a particular described piece of land.

Article 6 of the Treaty of May 7, 1868 says:-

> "ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the 'land book,' as herein directed, **shall cease to be held in common,** but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. (Boldface ours.)
>
> **15 Stat. 649, 2 Kappler 1008, 1011.**

In conformity with the provisions of the Treaty of May 7, 1868, Congress on April 11, 1882, ratified an agreement with the Crows wherein its was agreed:-

> "First. That the Goverment of the United States cause the agricultural lands remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively therefor, so soon as the necessary laws are passed by Congress. **Allotments in severalty of said surveyed lands shall be made as follows:** * * * " (Boldface ours.)
>
> **22 Stat. 42, 1 Kappler 195.**

and again in the same Act, at page 196:-

> "SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in **severalty** of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of

the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement." (Boldface ours.)

22 Stat. 42. 1 Kappler 196.

The General Allotting Act of February 8, 1887 (24 Stat. 388), provided for the allotting of the lands of the reservation among the Indians **in severalty** and the same Act provided that where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes the Secretary of the Interior is authorized to prescribe rules and regulations to secure a **just** and equal distribution of water among the Indians residing on said reservation.

"SEC 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the **Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation.**" (Boldface ours.)

24 Stat. 388, 1 Kappler 35.

Certainly a distribution to the individual Indian and not to the tribe. HOW COULD A DISTRIBUTION BE MADE TO THE TRIBE AS A WHOLE

—IF THERE WAS TO BE A DISTRIBUTION
WOULD HAVE TO BE MADE TO INDIVIDUA

In negotiating the treaty, the Government reques
and the Indians agreed, to give up a life of hunti
and fishing, wherein a large undivided tract w
necessary, and to accept a smaller reservation whe
in they were to change their mode of living to th
of an agricultural and pastoral people. The **Wint**
case holds that even though water was not mentio
in the treaty, there was an implied agreement, th
the water, necessary to permit the Indians to ad
the new mode of life, was reserved in them.
other construction of the treaty could be possible.

Carry the doctrine of the **Winters case** one st
further. By the treaties, the land and the water w
reserved to the Indians with the promise that t
Indian could make a selection of the land he desi
to farm as an individual, and the Government pro
ised to cause the agricultural lands to be prope
surveyed, divided among the Indians in severalty, a
to issue patents therefor.

The survey was made, the allotments entered a
patents issued. The Indian was given his share
the land so that he might farm for himself, beco
an individualist, and adopt an agricultural and p
toral life.

If it was the intention of the treaty to reserve t
water so that the Indians could make a living as far

ers, then, when the Indian was given his own individual land,—how could he be expected to make his living on "this barren waste" without the water to permit him to lead this pastoral and agricultural existence. Certainly he was given the water with the land.

It was the policy of the Government that when the Indians received their allotments, that they should become irrigation farmers. The Government's own records, introduced by petitioner, outlines this policy. H. J. Armstrong, Indian Agent at Crow, in his report to the Commissioner of Indian Affairs, dated November 22, 1884, sets forth the policy of the Government regarding irrigation on the Crow Reservation, and we quote therefrom:-

> "Above Soap Creek for a distance of about 10 miles there is some fine farming land but the banks of the Big Horn are lower as we approach the canyon, and the small farms already located there as well as others which will be located there during the next two or three years can be irrigated without much difficulty by the Indians themselves (with one or two white men to show them how to take the water out) directly from the Big Horn River." (R. 328.)

Certainly it was the intention that individual ditches should be taken directly from the river; and in the same report:-

> "The ditches 1 and 2 are supposed to include all the ditching necessary on the Little Big Horn River from the Grass Lodge Creek down to this agency—a distance of 28 miles. I do not mean

to say that these two ditches will cover all the farming land in this valley inside the 28 miles, but they include all the ditching that is practicable; and with a few irrigating wheels (wheels which by their own motion lift the water from the bed of the stream and pour it out on top of its banks) which we can build ourselves at an expense of about $25.00 each, will irrigate the whole of the 28 miles." (R. 328.)

It was intended that the lands not covered by the two project ditches could be irrigated by putting in "irrigating wheels"; and again:-

> "Above the mouth of the Grass Lodge Creek (on the Little Horn river) there is a great deal of fine farming land; but there are no wide valleys and there appears to be considerable more moisture as we approach the mountain range; furthermore, but few Crows are locating so high up in the valley, **so that the plan for irrigating that region need not be considered at present.**" (Boldface ours.) (R. 329.)

Here we find plans for irrigating the upper Lodge Grass lands, which are now owned by respondents, R. J. Miller, Billie Miller, and the Dethlefsens.

The same Indian Agent, on September 20, 1885, in his report to the Commissioner of Indian Affairs, says:-

> "This brings our report down to the subject of farming, which may be considered the most important work we have had before us. With white people it would be second to the stock business, but with Indians it is of the first importance, for the sole reason that it teaches them to have a **settled residence,** which is the starting point in the work of civilizing them." (R. 334.)

The policy of the Government was to make farmers out of the Indians. They were to have their own lands, and to farm their own lands they must have the water for these individual allotments.

RIGHTS GRANTED BY ALLOTMENTS AND PATENTS.

Counsel argues that since the allotment acts make no mention of water that the allotment carries with it no right to the use of water. They forget the decision of this Court in the **Winters case** which holds, that when water is necessary to carry out the intention of the parties, that water is reserved for the purpose contemplated. If there was an implied reservation of water in the treaty, the same construction applies to the allotment acts. Counsel cites the case of **British - American Co. v. Board,** 229 U. S. 159, 81 L. ed. 95, as authority for its contention that Congress could allot the lands in severalty and still retain the water. The case cited is not applicable. That case deals with the mineral rights, and the trust patents contained a reservation of all minerals for the benefit of the tribe. Certainly, when that reservation was made in the patent, the patentee could not expect to receive the minerals. Our case, is entirely different. But the case of **British-American Co. v. Board** upholds our contention to the effect that those things which are needed for farming and agriculture are a part of the estate granted:-

> "Obviously the mineral deposits which are the subject of the lease are not needed for farming or agricultural purposes and are not desired for individual allotments.
> The issue of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted."
> **British - American Oil Production Co. v. Board**, 299 U. S. 159, 81 L. ed. 95.

This is a case which comes from Montana.

FALLACY OF PART I OF PETITIONER'S ARGUMENT.

Petitioner argues that the water belonged to the tribe, in common, and that, when the Indian was granted his individual allotment, the water, instead of going to the Indian with his land, was retained by the tribe. Follow this argument to its logical conclusion and we find this situation: All the lands of the reservation have been allotted to individual Indians; no tribal lands remain; the individual Indians have no water for their lands; the tribe, as a whole, has all the water and no land upon which the water can be used. The petitioner's reasoning leads us to an absurd conclusion and absolutely destroys Part I of the petitioner's argument.

II.

WATER BECAME APPURTENANT ON ALLOTMENT.

The right to the water was retained by the Indians in the Treaty of May 7, 1868. The water was for use on the lands of the reservation to make it an agricultural and pastoral country, **Winters case**, not for use in mining as suggested by counsel.

When the land was allotted to the individual Indian. the water, following the intention of the treaty as construed by the Winters case, went with the land to the individual Indian.

When the patent was issued, it simply gave legal form to the rights which were granted in the treaty and confirmed by the allotments and the subsequent action of the Government. We do not contend that the patents, themselves, granted any rights not theretofore existing. The water became appurtenant to the land when the Indian received his allotment. It is significant that the patents make no attempt to reserve the water, although they do reserve other rights which the United States intended to retain. The Government patents for these lands convey the same "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging". (R. 460) In the patents there is a reservation for right-of-way for canals, constructed by the authority of the Government, but no specific reservation of water rights. In the deeds of conveyance,

from the patentees to these defendants, no reservation of water was made. (R. 462) The rights which were appurtenant to the land were conveyed by both the patent and the later deeds of conveyance. **Kelsey v. Bray,** 69 Mont. 78, 220 Pac. 532; **McDonald v. Lannen,** 19 Mont. 78, 47 Pac. 648; **Sloan v. Glancy,** 19 Mont. 70, and **Sweetland v. Olson,** 11 Mont. 27, 27 Pac. 339, as well as the cases cited by petitioner at page 25 of its brief. These respondents have all the rights of the original patentees.

VESTED RIGHTS.

Much has been said about the plenary powers of Congress, but Congress has no power to arbitrarily abrogate the right which has been actually conferred; Congress has no power to alter, cancel or destroy vested rights.

Once these rights have been conferred upon the Indian, neither the Secretary of the Interior, the Commissioner of Indian Affairs nor Congress can abrogate or take them away.

> "It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute."
>
> **Choate v. Trapp,** 224 U. S. 665, 674.

> "There is a broad distinction between power to abrogate a statute and to destroy rights under it; and, while Congress under its plenary power over Indian tribes can amend or appeal an agreement by a later statute, it cannot destroy actually

existing individual rights of property acquired under a former statute or agreement." (Syllabus 1.)

"Indians are not excepted from the protection guaranteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States." (Syllabus 10.)

Choate v. Trapp, 224 U. S. 665.

In the case of **Morrow v. U. S.,** 243 Fed. 854, 856, the Circuit Court of Appeals for the 8th Circuit says:

"There is no question that the Government may, in its dealings with the Indians, create property rights, which, once vested, even it cannot alter. **Williams v. Johnson,** 239 U. S. 414, 420, 60 L. Ed. 358; **Sisemore v. Brady,** 235 U. S. 441, 449, 59 L. Ed. 308; **Choate v. Trapp,** 224 U. S. 665, 56 L. Ed. 941; **English v. Richardson,** 224 U. S. 680, 56 L. Ed. 949; **Jones v. Meehan,** 175 U. S. 1, 44 L. Ed. 49; **Chase v. U. S.,** 222 Fed. 593, 596. Such property rights may result from agreements between the Government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the Government and the Indian and the resultant vested property rights in the Indian." (Boldface ours.)

The **Morrow** case was on the question of exemption of trust allotments from State taxation, and the Court, speaking more directly at that point, says at page 856:

"That exemption of land from taxation is a property right, is established. **Choate v. Trapp,** supra. That this Indian had taken possession of and was enjoying this land under such an ex-

> emption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a **binding agreement.**" (Boldface ours.)

The right of the Indian to the use of the water would seem, in the language of the Circuit Court of Appeals, to be a vested legal right, because it **rested on the solid basis of a binding agreement which has been fully executed.** This agreement was the agreement of the Government with the Indian as expressed in the Treaty of May 7, 1868, as interpreted by the **Winters** case, wherein the Government agreed, in consideration of the relinquishing of the remainder of the territory, to allot, in severalty, the remaining lands on the reservation to the individual members of the tribe.

Circuit Judge Sanborn, on the same subject of vested rights of an Indian, says:

> "If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because: First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. **Choate v. Trapp,**

224 U. S. 665, 670, 677, 32 Sup. Co. 565, 56 L. Ed. 941; **Jones v. Meehan,** 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; **In re Heff,** 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; **Cherokee Nation v. Hitchcock,** 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; **Jackson v. Goodell,** 20 Johns. (N.Y.) 188; **Lowry v. Weaver,** 4 McLean 82, Fed. Cas. No. 8, 584; **Whirlwind v. Vonder Ahe,** 67 Mo. App. 628; **Taylor v. Drew,** 21 Ark. 485, 487." (Boldface ours.)

Chase v. U. S., 222 F. 593, 596; reversed by **U. S. v. Chase,** 245 U. S. 89, 62 L. Ed. 89.

"It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute."

Choate v. Trapp, 224 U. S. 665, 674, 56 L. Ed. 941.

The U. S. District Court of Montana in the case of **United States v. Heinrich,** 12 F. (2d) 938, 939, in a case where many of the same questions were involved, held:

"Such patents as were issued here would, without doubt, include the water and ditch rights appurtenant to the land, although not expressly mentioned therein. **Brewer-Elliott Oil & Gas Co. v. United States,** 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140; **Hardin v. Jordan,** 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428; **Packer v. Bird,** 137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819; **Smith v. Denniff,** 23 Mont. 65, 57 P. 557, 50 L. R. A. 737; **Tucker v. Jones,** 8 Mont. 225, 19 P. 571; **McDonnell v. Huffine,** 44 Mont. 411, 120 P. 792.

Rights are said to be vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. **Pearsall v. Ry. Co.,** 161 U. S.

646, 675, 16 S. Ct. 705, 40 L. Ed. 838. 'A vested right is an immediate right of present enjoyment, or a present, fixed right of future enjoyment.' 4 Kent, Comm. 202.

An Indian's 'right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.' **Choate v. Trapp**, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941.

Titles confirmed many years before by the authorized agents of the government may not be nullified, and rights created by carrying a statute into effect cannot be devested or impaired. **Gritts v. Fischer**, 224 U. S. 640, 32 S. Ct. 580, 56 L. Ed. 928; **Reichert v. Felps**, 6 Wall. 160, 18 L. Ed. 849; **Sizemore v. Brady**, 235 U. S. 441, 35 S. Ct. 135, 59 L. Ed. 308; **U. S. v. Rowell**, 243 U. S. 464, 37 S. Ct. 425, 61 L. Ed. 848. Otherwise, where nothing had been done by officers of the government under prior act, and matter remained executory, and no vested right had attached at the time of approval of later act. **U. S. v. Stocksiager**, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. **Chase v. United States**, 222 F. 593, 138 C. C. A. 117." (Italics ours.)

United States v. Heinrich, 12 F. (2d) 938.

RIGHTS OF PURCHASER OF INDIAN LANDS AND WATERS.

Rights of Purchaser.

The Indian allottee has a right to the use of sufficient water to irrigate his irrigable land. That right is appurtenant to the land. Upon allotment the In-

dian became vested with all the rights incident to ownership of both the lands and the water under the treaties, with a priority of May 7, 1868. When the United States sold the dead Indians' land, it sold all of the Indians' interest in the land, which included the water. The purchaser of the land, either from the Indian, or his guardian, the United States Government, secured all the right of the Indian in and to the land and the water. A very lucid and a correct statement of the law is found in **United States v. Hibner**, 27 F. (2d) 909, 912, as follows:

> "This question is not free of difficulty, for it presents for consideration what is the status of the water rights of those who have acquired by purchase their lands from the Indians whose rights were reserved unto them, and who became vested with all the rights incident to ownership of both the lands and water under the treaties, with a priority of February 16, 1869. **The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of Skeem v. U. S., supra, and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians.**" (Boldface ours.)
>
> **United States v. Hibner**, 27 F. (2d) 912.

The Circuit Court of Appeals for the Ninth District, in deciding upon a Montana case, held that the water rights became appurtenant to the Indians' allotments and could be sold with the land:-

"That these ditches and water rights are priva property is clear. The ditches were built by a for Indians and for the lands in suit, and the wat by these ditches conveyed was upon these lan used. Thus appropriated, ditches and wat rights became appurtenant to the Indians' lotments, and like the allotments themselves, th property in severalty. And as such, they cou as they did convey them to plaintiffs."

Scheer v. Moody, 48 F. (2d) 327, 330.

The trial court and the lower court were right their findings that the Indian allottees had a vest right in the water and that the purchaser of the lands, either from the Indian himself, or from t Government as the Indian's guardian, steps into t shoes of the Indian.

III.

RECORD MISQUOTED.

It is very evident that counsel for petitioner, wh took no part in the trial of the case or in the arg ment in the lower court, are not familiar with t facts in the case or the record, and this may accou for the misapplication of the law. Counsel seem be under the impression that there are 63,000 acr of irrigable land under the irrigation projects a fected by this case. There are but 20,636.88 acres these projects which are considered irrigable by t Government. (R. 353, 357.) There are but six uni involved here, i.e. Agency, Lodge Grass No. 1, For Mile, Reno, Upper Little Horn No. 2, and Lodge Gra

No. 3. Bozeman Trail Ditch is not a government project as we will point out later in this brief.

At page 4 of its brief petitioner states that the project was constructed and maintained for the benefit of the Indian tribe. That is an error. In 1934 only 731 acres of Indian land were irrigated. (R. 404.)

Petitioner states at page 23 of its brief, that only three 40-acre tracts of the entire acreage to be allotted (by Roblin) were classified as irrigable, and these were so classified subsequent to their allotment. The three mentioned were classified prior to their allotment as these Indians had had no allotments under Rankin. Petitioner is talking about the Roblin allotments, and the above statement in the brief is incorrect. Roblin allotted to living Indians only. He allotted lands to eighteen Indians whose lands were under the Farmers Alliance Ditch. The three mentioned had sold their land to Antler Land Company, but the other fifteen still owned their allotments. (Ex. 29, 30; R. 485, 487) These lands are the same character as to irrigable, agricultural or grazing type, as the lands of respondent, Antler Land Company. (Ex. 29; R. 485.)

All the lands lying under the Farmers Alliance Ditch which had belonged to these eighteen were classified by Roblin as irrigable. (Ex. 48; R. 547-558.)

IV.

SECRETARY OF INTERIOR HAS NO DISCRETIONARY OR ARBITRARY POWER TO MAKE A DIVISION OF THE WATERS.

Petitioner in "b" of the second part of its argument contends "the control of the use of waters of the Indian reservation has been placed in the Secretary of the Interior." We strenuously dispute this contention.

Petitioner claims this authority is contained in Section 7 of the Allotment Act of February 8, 1887. This section is set forth at page 33 of this brief.

The plain intention of this section is to authorize the Secretary to prescribe "rules and regulations," —for what—**to secure a just and equal distribution** ···, to whom—**among the Indians residing upon the reservation.** His discretion is as to the rules and regulations, not as to the distribution. He could make rules as to how the water should be taken out of the stream and to see that the proper amount of irrigated land was given to each Indian residing on the reservation. but this act does not, or could not, give to the Secretary the right to give water to one piece of land and deny it to another. When the Secretary of the Interior attempts so to do, his actions are without authority and an unlawful and illegal usurpation of power.

A similar question was decided by the Federal

Courts in the case of **Mason v. Sams,** 5 F. (2d) 255: The treaty of 1855 with the Quinaielt Indians provided that the retained portion of the reservation was "reserved for the use and occupation of the bands and tribes aforesaid * * * ." The Secretary of the Interior made an order granting to certain members of the tribe the exclusive right to take fish on certain locations on the Quinaielt River which runs through the diminished reservation. The licensees were to pay a royalty on the fish taken which was to go to the common tribal fund.

In justifying the granting of exclusive fishing rights to a few, to the exclusion of others, the Secretary said:

> "In the interest of the tribe to whom fishing rights on the Quinaielt Reservation belongs, and for the reason that only a comparatively small number of Indians can be assigned fishing locations, the following percentage of the fishing receipts shall be collected and placed to the credit of the tribe as a royalty * * *."
>
> **Mason v. Sams,** 5 F. (2d) 255, 256.

But the Court ruled that the Secretary exceed his authority.

> "It is plain that there are only a comparatively small number of fishing locations upon the river within the reservation, and that, broadly speaking, the fishing rights upon the river belong to the tribe; but there can be fishing in the river without granting exclusive rights to defined locations.
>
> It does not follow, from the described condi-

> tions, that the individual Indian who wants to fish in that stream can be denied in order that, to his exclusion, fishing may be carried on for commercial purposes, in part, for the benefit of Indians of the tribe who do not care or who are not able to fish. The treaty was with the tribe; but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe—a right to a common is the right of an individual of the community." **Mason v. Sams,** 5 F. (2d) 258.

The syllabus in the last mentioned case reads as follows:

> "Under Treaty of 1855 with Quinaielt or Taholah Indians, the right to fish is common to all members of the tribe, and the Secretary of the Interior or Commissioner of Indian Affairs is without authority to make regulations under which particular locations on Quinaielt river are assigned to individual members with exclusive rights therein, and requiring them to pay royalty on fish sold for the benefit of other members of the tribe."

The attempt of the Secretary and Commissioner to make regulations granting to certain members of the Crow Tribe the right to use the waters of the Little Big Horn River to the exclusion of other members of the tribe is a similar unlawful usurpation of power.

The District Court of Montana has also passed upon this discretion of the Secretary and very aptly in a water litigation case in Montana, where the question of the rights of private ditches on the Flathead Res-

ervation is discussed and Judge Bourquin uses these words:

> "Immaterial is it also whether or not the allottees' appropriation of the waters was pursuant to rules by the Secretary prescribed as authorized by the Act of 1887 aforesaid. The statute vests discretion in the Secretary, is not mandatory, and is intended to restrict the recognized right of appropriations only so far as in the judgment of the Secretary its exercise in absence of controlling rules would work injustice. Rules or not, the Indians' necessities were as great, their right to appropriate water no less, save to the extent exercised inequitably. And as before noted, the Indians' appropriations of water were known to, sanctioned by, and acquiesced in by the Secretary, more effective than any of his rules and for which he perceived no necessity."

Scheer v. Moody, 48 F. (2d) 331.

DID THE SECRETARY EVER EXERCISE RIGHT TO DISTRIBUTE WATER?

The Secretary not only does not have the power or authority to devote these waters to the exclusive use of the Government projects, but he has never made any attempt to do so.

> "It is not alone a question of the **power** of the United States to devote these waters to the exclusive use of the Indians, but it is a question of whether it has **exercised the power.**"

U. S. v. Wightman, 230 F. 277, 283.

The Crow Tribe authorized the use of tribal funds in the construction of irrigating systems on Crow Indian Reservation, and they authorized the Secretary

of the Interior to spend that money. The authorization of the use of tribal funds to help build Government projects did not mean that there was to be one irrigation project. Appellant's own exhibit, report of H. J. Armstrong, Indian Agent at Crow (Ex. 3, R. 327, 328) says that in addition to the Government ditches the Indians themselves can take out private ditches. A part of this report states:

> "The small farms already located there as well as others which will be located there during the next two or three years can be irrigated without much difficulty by the Indians themselves (with one or two white men to show them how to take the water out) directly from the Big Horn River."

It is very evident that the Government then did not intend to make the Government project ditches the exclusive way of using the water of the reservation.

THE ACT OF MARCH 3, 1891 (26 STAT. 1040, 1 KAPPLER 433)

Evidently realizing the insecurity of reliance upon the Act of February 8, 1887, the petitioner says (p. 28 of its brief) that IF Section 7 of the Act of 1887 did not place control of all waters of the reservation in the Secretary of the Interior, the Act of March 3, 1891, has set aside and reserved the waters of the reservation for the lands under the Government irrigation system and that no waters could be used on allotted lands which were not under this system. The 1891 Act simply authorized the use of tribal money

to build dams, canals, ditches and laterals on the reservation. It made no attempt to grant water rights to any lands. Petitioner confuses a "water right" with "ditch rights." The 1891 Act and subsequent appropriation acts simply provided tribal and treasury money for constructing ditches. We have discussed this question at page 9 of this brief.

The intention of the Government when it advanced treasury and tribal money for the construction of these ditches was simply to make a loan for the building of the ditch as is evidenced by the Act of May 26, 1926 (44 Stat. 653-661, 4 Kappler 552), which amended the Act of June 4, 1920. (41 Stat. 751, 4 Kappler 271.) The 1926 Act declared that tribal moneys expended in the construction of the Crow Irrigation systems were reimbursible, and an attempt was made to collect the same from the land irrigated. The case of **U. S. vs. Heinrich,** 12 F. (2) 938, supra, grew out of the attempt of the United States to collect these moneys from the purchaser of the land.

Congress, when it took the tribal money belonging to all the Indians, to build ditches for a few Indians did a great injustice to those Indians whose irrigable lands were not under the Government system. To now attempt to deprive these Indians of the right to water is the height of injustice.

V.

THE EQUITIES.

This is not an action to protect the Indians.

In 1934 the total acreage actually irrigated by the Crow Irrigation Project systems in the Little Big Horn and Lodge Grass area was 7,419 acres, of which 4,619 acres were Indian owned, and 2,800 acres white owned. (R. 400.) Of the Indian owned land, only 567 acres were irrigated by the Indians themselves, (R. 405) the remainder of the Indian owned land being farmed by white men who are lessees of Indian land. Thse figures do not include Bozeman Trail Ditch where the total acreage susceptible to irrigation is 1,881.49 acres (R. 400), and the number of acres of Indian owned land actually irrigated under that ditch in 1934 was 990 acres. (R. 401.) Only 20 acres of these Indian owned lands were actually irrigated by Indians. (R. 405.)

If the water was to be reserved for the Indians themselves and not their assignees, we find that there are only 587 acres entitled to water. The petitioner is attempting to deliver water to white lessees of Indian lands and to deny it to white owners of Indian land. This is really an action to protect one group of white men against another group of white men.

BOZEMAN TRAIL DITCH.

The Bozeman Trail Ditch is a privately owned company covering 2819.39 irrigable acres. (R. 351.) In

1922 the United States of America, through the Secretary of the Interior, entered into a contract granting to said private company the right to divert from the Little Big Horn River water to irrigate 2819.39 acres of land. (R. 373, 375.)

The Bozeman Trail Ditch Company contract was made July 24, 1922. (Ex. 13, R. 373.) It recites that the company has constructed the canal; evidently it had been constructed before the contract was entered into, and it is equally evident, without any prior consent of the government, as the record fails to show any such consent before the canal was constructed. **Under the contract a right-of-way is granted the company for its canal, and the company sells water rights to the Government for Indians having land under the canal. The company sold, assigned and conveyed absolute water rights in its canal for the irrigation of 1961.34 acres of allotted Indian lands.** (R. 375.)

Evidently the Government at that time was not acting upon the theory that all water rights were reserved for the Indians and the Government irrigation projects. We find numerous acts of Congress which show that Congress considers that neither the United States nor the Secretary of the Interior has any right to water on Indian Reservations except through purchase.

Chapter 994, 32 Stat. 997, appropriated $150,000 for the "Purchase of water rights on Indian Reser-

vations in the discretion of the Secretary of the Interior, and subject to his control, and for other purposes." $125,000 was appropriated for purchase of water rights on Indian reservations and for other purposes, by Act of March 1, 1907. (34 Stat. 1017.) A similar appropriation of $200,000 was made March 3, 1909. (35 Stat. 782.) Likewise appropriations of $314,000 (36 Stat. 1059); $325,000 (37 Stat. 518); $335,000 (38 Stat. 78, and 582); $235,000 (39 Stat. 124 and 929), and other appropriations for the same purpose. (43 Stat. 400 and 1150; 44 Stat. 943; 47 Stat. 21.)

35 Stat. 812 reads as follows:

> "To enable the Commissioner of Indian Affairs to perfect and protect the rights of the Uncompahgre, Uintah, and White River Utes in Utah in and to the waters appropriated under the laws of the State of Utah for the irrigation systems authorized by the Act of June twenty-first, nineteen hundred and six, two hundred thousand dollars, or so much thereof as may be necessary, the amount expended hereunder to be reimbursed from the proceeds of the sale of lands within the former Uintah Reservation: Provided, that said sum, or any part thereof, shall be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians, and any sum expended hereunder shall be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation."

and again:

> "That the Secretary of the Interior is hereby

authorized to expend from the funds of the Southern Ute Indians in the Treasury of the United States sufficient moneys, not exceeding one hundred and fifty thousand dollars, to purchase a perpetual water right for the purpose of irrigating not less than ten thousand acres of land in the Southern Ute Indian Reservation in Colorado." (35 Stat. 788.)

By act of June 10, 1922 (42 Stat. 625), an appropriation of $24,000.00 was made for the purpose of purchasing water rights for Indians in Two Leggins Canal for the irrigation of allotted lands of the Crow Indians.

Under Article 2 of the Crow Treaty of August 14, 1899 (33 Stat. 352, 3 Kappler 88), $10,000.00 was to be spent in the building, extension and completion of individual Indian ditches.

Under the Bozeman Trail Ditch contract the Secretary of the Interior and the United States granted water from the Little Big Horn river to irrigate 856 acres of white owned land. What right did the Secretary of the Interior have to give away this water to a private corporation? The contract itself (R. 373) says that the Bozeman Trail Ditch Company is a corporation organized and existing under the laws of the State of Montana. How can the Secretary of the Interior grant water to white land owners under the Bozeman Trail Ditch, a private ditch, and deny it to white land owners under the Tschirgi Ditch, a private ditch? How can the Secretary of the Interior grant water to the Indian land owners under the Bozeman

Trail Ditch and deny it to the Indian land owners under the Tschirgi Ditch? Is this the "**just and equal distribution**" provided for by the act of February 8, 1887 (24 Stat. L. 388)? Is this equality? If there has been a shortage of water for the government projects for many years, as claimed by appellant, why were additional lands placed under the Bozeman Trail Ditch in 1922? Why were white men given water out of that ditch? If there is such a shortage of water, why didn't plaintiff stop the Wyoming water users from taking the water? (R. 379.) Wyoming is outside the reservation and under the authority of the **Winters** case these diverters could be stopped. If proper use were made of the available waters, would there not be enough to irrigate all irrigable Indian allotted lands on the reservation?

The Department of the Interior and Congress recognize the fact that there is sufficient water to irrigate all the lands of these projects if the water is properly conserved. Congress in the Appropriation Act of August 9, 1937, (50 Stat. 580) appropriated $200,000.00 for the construction of dams on Lodge Grass Creek so as to store the water for these projects, and the General Appropriation Act of 1938 carries an additional $200,000.00 for the same purpose. When these dams are constructed, there should be sufficient water for all the irrigable land on the Little Big Horn River and Lodge Grass Creek.

THIS IS AN INJUNCTION SUIT.

Petitioner seeks to restrain the respondents **"from in any manner diverting the waters of Lodge Grass Creek and the Little Big Horn River."** (Plaintiff's Bill of Complaint, R. 28.) If the respondents, or any of them, are entitled to **any** water the action must fail as to them.

We contend that the petitioner has failed to establish a cause of action against any of the respondents.

Defendants M. H. Tschirgi and Bertha Tschirgi.

The trial Court found that the plaintiff had failed to establish a cause of action against M. H. Tschirgi and Bertha Tschirgi who were improperly joined as party defendants and decreed that this cause of action be dismissed as to them. (R. 249, 250.) The evidence sustains such a finding and decree.

In conclusion we believe that the evidence establishes facts to warrant the following conclusion of law:

That at all times the Indians of the Crow Tribe were vested with the land and the waters of the reservation;

That this was a common right until the allotment of the lands to individual Indians and then the right to the use of the water necessary for the proper irrigation of the irrigable lands of each allotment became

vested in the Indian allottee, with a priority of May 7, 1868, subject to equal distribution of the available water to the total irrigable lands of the reservation;

That the Indian predecessors of the defendants were allotted the lands described in the answer:

That the United States conveyed these lands to the defendants, or their predecessors, by patents which included the water and water rights appurtenant to the land;

That these defendants, by mesne conveyance, are now the owners of the lands and water claimed by them in their answer, with as full a right thereto as their predecessors, including the Indian allottees;

That the Secretary of the Interior had no power or authority to grant water or water rights to one Indian's land or take such rights away from another Indian's land;

That the Secretary of the Interior has made no attempt to determine what lands on the Crow Reservation are entitled to water;

That the construction of the United States Indian Irrigation Service Ditches was for the purpose of conveying the water appurtenant to the lands lying under such ditches to such lands and was not an adjudication that such lands were legally entitled to such water, or that lands not under such ditches were not entitled to water.

That the Indian predecessors of these respondents were entitled to sufficient water to irrigate the irri-

gable lands of defendants as described in their answer provided there was sufficient water in the streams for such purpose and if there was not sufficient water then they were entitled to their pro rata share of such available water divided among the total irrigable land on the reservation;

That these defendants are now vested with all the rights of their Indian predecessors, including the right to sufficient water to irrigate such lands to the same extent as was such Indian; and

That plaintiff has failed to introduce facts to justify it to any relief as against these defendants.

For a brief, clear, apt and logical brief in support of respondents' case, we could do no better than cite Judge Pray's decision in this case which is found at page 253 of the Record. The decision sets forth the facts and the law, and we wish to incorporate it as a part of our brief.

WHEREFORE, it is respectfully requested, that the decree of the court below be affirmed.

T. H. BURKE,

Attorney for Respondents.

Billings, Montana,
November 8, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 102.—October Term, 1938.

The United States of America, Petitioners, *vs.* Thomas R. Powers, et al.	Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 9, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

By this proceeding (begun in 1934) the United States seek to prevent further taking of water from certain non-navigable streams within the Crow Indian Reservation. This water is essential to the cultivation of respondents' lands allotted more than twenty years ago to members of the tribe and presently held under properly acquired fee simple titles. The prayer of the bill is for a permanent injunction against "maintaining or using said dams and ditches, as aforesaid, and from diverting by means of said dams and ditches or in any other manner any of the waters from Lodge Grass Creek or Little Big Horn River and their tributaries; . . . ."

The decree of the Circuit Court of Appeals dismissing the bill must be affirmed.

By Treaty of May 7, 1868 [15 Stat. 649, 650-651] the United States set aside a large tract of arid land now within the State of Montana as a Reservation for the "absolute and undisturbed use and occupation" of Crow Indians, and they undertook to make their permanent homes thereon. It provides that whenever an individual Indian desires "to commence farming" he may select land, under stated conditions, which thereupon shall "cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." Also—

"The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the char-

acter of the title held by each. . . . When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum."

The Treaty contains no definite provision concerning apportionment or use of waters. Although the lands are arid a considerable area is susceptible of cultivation under irrigation.

The Act of Congress approved April 11, 1882 [Ch. 74, 22 Stat. 42, 43] refers to "an agreement for the sale to the United States [by the Crows] of a portion of their said reservation, and for their settlement upon lands in severalty," etc. In return the United States agreed to survey the remaining lands and divide them among members of the tribe; also "to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress." Section 2—

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement."

The Act of February 8, 1887 [Ch. 119, 24 Stat. 388, 389-390] provides for allotments in severalty to Indians upon any reservation created for their use whenever in the President's opinion any part is advantageous for agricultural and grazing purposes. And it directs that after allotments are approved the Secretary of the Interior shall issue patents declaring the United States will hold the land for twenty-five years in trust and thereafter "will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ." Section 7—

"That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for

agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Act of March 3, 1891 [Ch. 543, 26 Stat. 989, 1040] mentions another conveyance by the Crows to the United States and appropriates $200,000 to be expended under direction of the Secretary of the Interior for irrigation in the valleys of the Big Horn and Little Big Horn Rivers and on Pryor Creek, within the diminished Reservation.

The Act of May 8, 1906 [Ch. 2348, 34 Stat. 182, 183] authorizes the Secretary of the Interior to issue to Indian allottees patents in fee simple "and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ." Also—

"Hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

Commencing in 1901 allotments in severalty of tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek were made to respondents' Indian predecessors. These culminated in the issuance of fee simple patents as provided by Act of May 8, 1906.[1] Each patent undertook to convey the land "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging," but contained no express provision concerning water rights. Respondents have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands.

The Little Big Horn River and its affluent, Lodge Grass Creek, under normal conditions may afford sufficient water to irrigate

[1] Ch. 2348, 34 Stat. 182.

twenty thousand acres within the Reservation. Through private ditches respondents and their predecessors have long conveyed water from these streams in order to irrigate their lands and thus render them susceptible of cultivation. It is not suggested that water therefor can be obtained from any other source.

Petitioners maintain—

That prior to 1885, the United States commenced construction of irrigation works intended to divert waters from the streams in question. These gradually developed into a system normally capable of carrying sufficient water to irrigate 20,000 acres.[2] None of respondents' lands lie within the ambit of these projects; and neither the original allotments nor the patents specifically granted the use of any water.

That Congress gave the Secretary of the Interior control of Reservation waters. Irrigation projects initiated under his authority prior to allotments of respondents' lands sufficed to dedicate and reserve sufficient water for full utilization of these projects; rights acquired by the allottees were taken subject to this reservation.

That because of drought during 1931 to 1934, and respondents' diversion of waters upstream from the projects so initiated, the available water became insufficient properly to irrigate some 8,000 acres lying therein and under cultivation. Accordingly the injunction should be granted; all waters from the two streams had been devoted to those and similarly situated lands so far as necessary for farming operations.

Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters* v. *United States*, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

The respondents' claim to the extent stated is well founded.

Manifestly the Treaty of 1868 contemplated ultimate setlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible.

We can find nothing in the statutes after 1868 adequate to show

[2] See Act of March 1, 1899, Ch. 324, 30 Stat. 924; Act of May 31, 1900, Ch. 598, 31 Stat. 221; Act of April 27, 1904, Ch. 1624, 33 Stat. 352.

Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.

The Secretary of the Interior had authority [Act 1887] to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.

Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty. Subsequent allotments for farming followed by patents negative any such notion. The patented lands had no value for agriculture without water; they were selected for homes and individual farming.

The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end.

The challenged decree must be affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.